SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 559.

BESSIE BROWN ENGLISH, PLAINTIFF IN ERROR,

vs.

H. T. RICHARDSON, COUNTY TREASURER OF TULSA COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 25, 1911.

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1 The Supreme Court of the United States, October Term, 1910.

In Equity.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

Citation.

The President of the United States to H. T. Richardson, County Treasurer of Tulsa County:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington D. C. within 30 days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma wherein Bessie Brown English is plaintiff in error, and you, H. T. Richardson, County Treasurer of Tulsa County, are defendant in error, to show cause, if any there be, why the judgment against the plaintiff, as in said writ of error mentioned, should not be collected and why justice should not be done to parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of Supreme Court of the United States, this 27th day of March 1911.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

We, the undersigned Attorneys of record for H. T. Richardson, County Treasurer of Tulsa County, in the above cause, hereby accept service of the foregoing citation and acknowledge receipt of a copy thereof this 28 day of March, 1911.

CHARLES WEST,
Attorney General of Oklahoma.

———— ————,
Ass'nt Attorney General, Oklahoma,
Attorneys for Defendant in Error.

2 STATE OF OKLAHOMA,
Oklahoma County, ss:

Grant Foreman, being first duly sworn, deposes and says that, he is one of the attorneys of record for the plaintiff in error; that he served the foregoing citation on Charles L. Moore, one of the attor-

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neys on the record for the defendant in error herein, by leaving a copy of same in his office, in Oklahoma City Oklahoma with the person in charge thereof, on this 28th day of March, 1911.

GRANT FOREMAN.

Subscribed and sworn to before me, this 28th day of March, 1911.

[Seal Supreme Court, State of Oklahoma.]

JESSIE PARDOE,
Deputy Clerk Supreme Court.

[Endorsed:] Citation. Filed Mar. 28, 1911. W. H. L. Campbell, Clerk.

3 The Supreme Court of the United States, October Term, 1910.

In Equity.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

Petition for Writ of Error.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now comes Bessie Brown English, plaintiff in error in the above cause, and would show unto this Honorable Court that in the record and proceedings and rendition of decree in the above cause by the Supreme Court of the State of Oklahoma, it being the highest Court of said State and the Court of lasst resort in which a decision could be had on the said suit between Bessie Brown English and H. T. Richardson, County Treasurer of Tulsa County, manifest error has occurred greatly to her damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question the construction of Sections 16 and 21 of an Act of Congress approved June 30th, 1902, (32 Stat., 500) entitled, "An Act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes," and the decision was against the right and privileges especially set up and claimed by plaintiff in error under said Sections; that Bessie Brown English, plaintiff in error, claimed and asserted in the said proceedings that by virtue of said Section 16, of said Act of Congress, her homestead was exempt from taxation for a period of 21 years from the date she received her deed therefor, to-wit, the 12th day of December, 1902; that Bessie Brown English, plaintiff in error, denied the validity of the first clause of Section 4 of an Act of Congress approved May

27th, 1908, (35 Stat., 312) entitled, "An Act for the removal of restrictions from part of the lands of the allottees of the five civilized tribes, and for other purposes," in so far as the said provision attempted to violate the exemption privilege and right guaranteed to her under the said Section 16 of the said Supplemental Creek Agreement above referred to, if said clause was so intended, and denied that the said clause of the said Section 4 was intended to so violate her exemption rights, and that the decision in the above cause was also against her contentions in that regard, all of which is fully apparent in the record and proceedings in the cause and specifically set forth in the assignment of error filed herewith.

Wherefore petitioner prays that her appeal be allowed and that the transcript of the record, proceedings and papers upon which said orders were made and judgment and decree rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington D. C. under the rules of said Court in such cases made and provided, that the same may be inspected and corrected according to law and justice should be done.

W. L. STURDEVANT,
GRANT FOREMAN,
M. L. MOTT,
Solicitors for Plaintiff in Error.

4 [Endorsed:] 1761. Petition for Writ of Error. Copy. Filed Mar. 28, 1911. W. H. L. Campbell, Clerk.

5 The Supreme Court of the United States, October Term, 1910.

In Equity.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

Assignment of Error.

Comes now plaintiff in error, Bessie Brown English, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Oklahoma erred to the great damage and wrong of the plaintiff in error herein, and to the prejudice and against the rights of the plaintiff in error, (the errors herein assigned being based upon the decision of the Supreme Court of Oklahoma in cause No. 1877, entitled, Michael H. Gleason et al., plaintiff in error, vs. J. I. Wood, County Treasurer of Pittsburg County, et al., defendants in error, which decision was by an order of the Supreme Court adopted and promulgated as the opinion in this cause). The errors of the said Supreme Court are as follows, to-wit:

First. The said Supreme Court erred in adjudging that the issues presented in this cause are identical in all respects with those of the said above mentioned case of Gleason vs. Wood, except that the same

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are applicable to the allottees of the Creek Tribe of Indians; and erred in deciding this cause against the plaintiff in error upon the grounds stated in said opinion.

Second. The Supreme Court erred in deciding that Section 16 of an Act of Congress, approved June 30, 1902, (32 Stat. 500) entitled, "An Act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians and for other purposes," does not vest in plaintiff in error a valuable property right, to-wit, the exemption of her homestead from taxation for a period of 21 years from the date of her deed therefor, to-wit, Dec. 12, 1902.

Third. The said Supreme Court erred in deciding that the exemption guaranteed to her by the said Section 16 of the said Act does not constitute a contract resting upon a valuable consideration which cannot be impaired or violated by any supplemental Act of Legislation, either on the part of Congress or the State of Oklahoma.

Fourth. The last sentence of Section 16 of the said Act of June 30, 1902, provides as follows: "Each citizen shall select from his allotment 40 acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable and free from any incumbrance for 21 years from date of the deed therefor and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear." The Supreme Court erred in deciding tht the grant of an exemption from taxation contained in said clause and the stipulation in the deed of plaintiff in error to her hometsead, to the effect that it should be free from taxation for a period of 21 years, as required by said clause, does not vest in her an absolute and unconditional property right and constitute a grant and contract in her favor which is protected by Section 10 of Article 1 of the Constitution of the United States, and which is likewise protected by amendments 5 and 14 of the Constitution.

Fifth. The said Supreme Court erred in deciding that the said exemption was a mere gratuity and rested upon no consideration and was subject to be withdrawn at any time by the legislative authority so that, notwithstanding she is a citizen of the United States and owns her homestead in fee-simple title and that such exemption adds great value to her estate, that, nevertheless, such property right may be extinguished by an Act of legislation and herself thereby deprived of the value thereof without compensation.

Sixth. The demurrer filed to the petition of plaintiff in error in the lower court conceded, under the practice Act of Oklahoma, that the exemption of plaintiff in error was a property right of great value and that rested upon a valuable consideration passing from her, and that the property interest exchanged by her for the allotment received was greatly in excess of the value of said allotment and

6 it was also admitted by said demurrer that the exemption right and privilege granted to her in said Section 16 was one of the inducements and considerations which influenced her to accept the allotment and relinquish her interest in the Tribal estate and to also cooperate with the Government in its policy of allotting the lands of her Tribe in severalty to the members thereof.

Seventh. The said Supreme Court erred in failing to decide that Section 16 in connection with Section 21 of the said Act of June 30, 1902, (32 Stat. 500) constitutes a covenant between plaintiff in error and the Government of the United States, which cannot be broken (the conditions of all being complied with) without the exercise of bad faith toward her, a member of a dependent and confiding race.

Eighth. The said Supreme Court erred in deciding that the first clause of Section 4 of an Act of Congress, approved May 27, 1908, (35 Stat. 312) was intended by Congress to subject the lands in controversy herein to taxation; and erred in failing to decide that the land in controversy and the class of lands to which it belongs should be exempt from the operation of the statute; and erred in failing to decide that the application of the statute should be limited to lands on which the statute could operate without effecting the class of lands in controversy, and the vested rights if the owners thereof.

Ninth. The said Supreme Court erred in deciding that the said Section 4 of the Act of May 27th, 1908, if intended to apply to this class of lands in controversy, was a valid exercise of the power of the legislature.

Tenth. The said Supreme Court erred in deciding that the said Section 4 of the said Act was intended to apply to the homestead of plaintiff in error and lands of that class, and in deciding that the said Act in that regard is constitutional; and erred in deciding that the said Section 4 is a valid law, and that the said homestead of plaintiff in error is subject to taxation by virtue thereof.

Eleventh. The said Supreme Court erred in denying to plaintiff in error the rights, privileges and immunities granted to her by said Section 16 of the said Act of Congress of June 30, 1902, (32 Stat. 500) against her contention and that said rights should be protected; and erred in sustaining the decision of the trial court in which the demurrer to her petition was sustained and a judgment rendered against her, depriving her of the rights, privileges and immunities claimed, and adjudging her to pay the cost of the action, and further erred in not reversing the said trial Court and deciding the issue in favor of the plaintiff in error.

Wherefore, by these and other manifest errors appearing on the record, the said Bessie Brown English, plaintiff in error, prays that the judgment of the said Supreme Court of Oklahoma be reversed and set aside and for naught held and that a judgment and decree be rendered for plaintiff in error granting her the rights, immunities and protections claimed by her under the said statute and the laws of the United States and also prays judgment for her costs.

W. L. STURDEVANT,
GRANT FOREMAN AND
M. L. MOTT,
Solicitors for Bessie Brown English, Plaintiff in Error.

7 [Endorsed:] 1761. Assignments of Error. Copy. Filed Mar. 28, 1911. W. H. L. Campbell, Clerk.

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8 In the Supreme Court of the State of Oklahoma.

In Equity.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

Order of Allowance.

On this 27th day of March, 1911, came on to be heard the application of Bessie Brown English, plaintiff in error, said plaintiff in error being present by counsel, for a writ of error, and it appearing to the Court from the petition filed herein, and the record in the cause that the application ought to be granted and that a transcript of the record and proceedings and papers on which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the plaintiff giving bond, conditioned as the law directs, in the sum of Five Hundred Dollars ($500), which may operate as a supersedeas, and that a true copy of the record, assignment of errors, and all proceedings had in the case in the Supreme Court of the State of Oklahoma, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said Court may inspect the same and do, what according to law, should be done.

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

Attest:
W. H. L. CAMPBELL,
[SEAL.] *Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

Filed March 28, 1911. W. H. L. Campbell, Clerk.

[Endorsed:] 1761. Order allowing Writ.

9 The Supreme Court of the United States, October Term, 1910.

In Equity.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

Writ of Error.

The President of the United States to the Honorable Judges of the Supreme Court of the State of Oklahoma:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court before you, or some

of you, between Bessie Brown English, plaintiff in error, and H. T. Richardson, County Treasurer of Tulsa County, defen-ant in error, your court being the highest court in said State having jurisdiction to render judgment in the case, there was drawn in question the construction of Sections 16 and 21 of an Act of Congress approved June 30, 1902, (32 Stat., 500), and the decision was against the right, immunity and privileges especially set out and claimed by said Bessie Brown English under the said Sections 16 and 21 of the said Act of Congress approved as aforesaid, there being also drawn in question in said cause the validity of the first clause of Section 4 of an Act of Congress approved May 27, 1908 (35 Stat. 312), The desision of which was against the contention and the rights, privileges and immunities of plaintiff in error, and there being manifest errors in said decision greatly to the damage of Bessie Brown English, plaintiff in error, we being willing that if there is error it should be duly corrected, we do therefore, command you, if judgment be therein given that under the seal of your Court, you send the records and proceedings had in said cause to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 26th day of April 1911, in the Supreme Court to be then and there held that the record may be inspected by the Supreme Court and justice done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 27th day of March, 1911.

[Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk of the Circuit Court of the United States for the Western District of Oklahoma.

Allowed, on giving bond as required by law in the sum of Five Hundred no/100 dollars, by

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

Return.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the above cause, with all things concerning the same.

In witness whereof I hereby subscribe my name and affix the seal of the said Court, at office in the City of Oklahoma, this 28th day of March, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court, State of Oklahoma;
By JESSIE PARDOE, *Deputy.*

COPY

10 [Endorsed:] Writ of Error and Return. Filed Mar. 28, 1911. W. H. L. Campbell, Clerk.

11 In the Supreme Court of the State of Oklahoma.

In Equity.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

Bond.

Know all men by these presents, that we Bessie Brown English, as *principle*, and Southern Surety Company (a corporation authorized by law to do business in the State of Oklahoma) of Muskogee, Oklahoma, as *surety* are held and firmly bound *under* H. T. Richardson, county Treasurer of Tulsa County, above named, in the sum of Five hundred (500) dollars to be paid to the said H. T. Richardson, County Treasurer of Tulsa County, his executors, administrators and assigns to which payment will and truly be made, we bind ourselves and each of us jointly and sever-ly to our and each of our executors, administrators and assigns firmly by these presents.

Sealed with our seals and dated this 27th day of March, 1911.

Whereas the above named plaintiff in error, Bessie Brown English, has sued out a writ of error to the Supreme Court of the United States to reverse and correct the judgment and decree in the above entitled cause rendered by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above named Bessie Brown English shall prosecute said writ of error and answer all costs, if she fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and effect.

BESSIE BROWN ENGLISH,
Principle,
By GRANT FOREMAN,
Her Attorney in Fact;
SOUTHERN SURETY CO.,
Surety,
By N. F. HAWKINS,
Att'y in Fact.

Approved this 27th day of March, 1911, on its execution by the Southern Surety Co.

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

Filed March 28, 1911. W. H. L. Campbell, Clerk.

12 Filed Jun- 9th, 1910. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

The said Bessie Brown English, plaintiff in error, compalins of said defendant in error, H. T. Richardson, for that the said H. T. Richardson, County Treasurer of Tulsa County, at the February Term of the District Court of Tulsa County, State of Oklahoma, recovered a judgment by the consideration of said court against the said Bessie Brown English in a certain action then pending in said court wherein the said Bessie Brown English was plaintiff and the said H. T. Richardson as County Treasurer, was defendant. The original case made of said case duly certified and attested is hereunto attached, marked Exhibit "A", and made a part of this petition in error, and the said Bessie Brown English avers that there is error in the said record and proceedings in this:

1. Said Court erred in holding that the plaintiff by her petition had not stated facts sufficient to constitute a cause of action against the defendant.

2. The court erred in holding that the demurrer of the defendant was well taken and should be sustained.

3. The court erred in sustaining the demurrer of the defendant H. T. Richardson to the petition of the plaintiff Bessie Brown English.

4. The court erred in dismissing the petition of the plaintiff Bessie Brown English.

13 5. The court erred in rendering judgment for the defendant H. T. Richardson, against the plaintiff, Bessie Brown English for his costs in said suit.

6. The court erred in refusing to render judgment in favor of the plaintiff Bessie Brown English and against the defendant, H. T. Richardson upon the pleadings.

7. The court erred in refusing to overrule the demurrer of the defendant H. T. Richardson and require him to answer the petition of the plaintiff in error.

Wherefore, the plaintiff in error prays that said judgment may be reversed, set aside, and held for naught and that a judgment may be rendered herein in favor of the plaintiff in error and against the defendant in error upon the pleadings directing that a decree be entered finding the issues in favor of the plaintiff awarding to her the relief prayed for in her said petition.

BESSIE BROWN ENGLISH.
Plaintiff in Error,
By W. L. STURDEVANT,
GRANT FOREMAN,
Attorneys for Plaintiff in Error.

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14 EXHIBIT "A."

STATE OF OKLAHOMA,
County of Tulsa, ss:

In the District Court in and for said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

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15 STATE OF OKAHOMA,
County of Tulsa, ss:

In the District Court in and for said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

Case Made.

Be it remembered: That heretofore, to-wit: on the 19th day of November, 1909, the above named plaintiff, Bessie Brown English instituted this suit against the said defendant, H. T. Richardson, as County Treasurer of Tulsa County, Oklahoma, in the above named Court sitting at Tulsa, by filing in the office of the Clerk of said District Court her petition, which is in the words and figures following, to-wit:

16 STATE OF OKLAHOMA,
County of Tulsa, ss:

In the District Court in and for said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

Petition.

Plaintiff states that she is now and during her entire life has been a member and citizen of the Creek or Muskogee Tribe of Indians, which is one of the Five Civilized Tribes, and is an inhabitant and resident of the County of Tulsa, in the State of Oklahoma, and is a citizen of the United States and the said State of Oklahoma; that on the 27th day of October, 1899, she was duly enrolled as a member of the said Creek Tribe by the proper authorities in charge of such enrollment and that her name now appears upon the record thereof on file in the office of the Commission to the Five Civilized Tribes, her enrollment number being 2960; and that as such citizen of said Tribe she was at all times hereinafter mentioned and is now entitled to all the property, rights, privileges and benefits arising therefrom and had an interest in all the communal property of the said Tribe
17 of Indians of every kind and description incident to and arising from such membership and citizenship therein; that prior to the allotment of the land and property of the Tribe in severalty to the various citizens thereof as hereinafter stated, each citizen, including this plaintiff, had and possessed an equal, undivided communal interest therein with every other citizen and at no time and in no manner did this plaintiff ever forfeit or relinquish any of said rights prior to the time of receiving the allotment of lands as hereinbelow stated.

Plaintiff further states that by virtue of an Act of Congress, approved May 28, 1830, and a patent issued to the Creek Tribe of Indians in pursuance thereof, bearing date, August 11, 1852, the said Tribe became the owner in fee simple of all that tract of land in the said Act of Congress and the said patent described located in the then unsettled Indian Territory, now comprising all of eight, and the minor portion of another, of the large counties of the present State of Oklahoma; that under the provisions of the said Act on Congress and the treaties between the Government, and said Tribe upon which said Act was based, the Government, in recognition of its obligation to an inferior and dependent race with which it had concluded negotiations for the exchange of lands agreed and undertook to protect the said Tribe in its undisturbed ownership and occupancy of the lands so conveyed to it as its new home and future abiding place; that the obligation so assumed by the Government contemplated the

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preservation of such lands for the exclusive use and benefit of the Tribe, all the members thereof and their de-cendants; and to protect the Indian against his own improvidence and to secure him a fixed home, all as expressed in said Act and the patent made in pursuance thereof, the said lands and all parts thereof were made inalienable and were never subject to conveyance, incumbrance, liens, judgments or charges of any character whatever, and in that condition so remained under the said guarantee and protection of the United States until modified by an agreement between the United States and said Tribe as hereinafter set forth.

18 Plaintiff further states that, yielding to urgent and repeated requests on the part of the Government and the persistent importunities of white settlers who had already become numerous, and were daily becoming more numerous, among the Indian population, the Tribe consented to enter into negotiations with the Government having for their purpose the partition of all Tribal lands and property and the distribution of same among the individual members of the Tribe in severalty.

Plaintiff further states that thereupon, to-wit, on the 8th day of March, 1901, having in view such negotiations the Commission to the Five Civilized Tribes representing the Government met in convention at the city of Washington with the duly constituted representatives of the Creek Nation of Indians consisting of Pleasant Porter, Principal Chief, George A. Alexander, David M. Hodge, Isparhecher, Albert P. McKellop and Cub McIntosh to negotiate an agreement between the United States of America upon one part and the Creek Tribe of Indians upon the other part, as the contracting parties, having as its purpose the partition of the tribal property of the said Creek Nation and the allotment of same as aforesaid and that on the said date when the said convention assembled the said Creek Tribe of Indians was the owner in fee simple of all the lands above mentioned in the said patent conveyed, subject to the condition aforesaid.

Plaintiff further states that having in view the long standing obligation of the Government to the Tribe, as so expressed in said Act of Congress and patent and arising from the guardianship which the Government exercised over the Indian and his affairs, and recognizing that the welfare of the Indian in the unequal race with the white man, which he was about to enter, demanded a continued protection in the undisturbed use and enjoyment, for a limited time, of a small portion of the property which would fall to him as an allotment and as an inducement and consideration to the

19 Indian to accept his portion of the tribal property in severalty and relinquish his interest in the tribal property allotted and to be allotted, it was provided by the said convention that each citizen should receive a fixed portion of said lands from which he should select the amount of 40 acres thereof as a homestead, and that such homestead should be inalienable and nontaxable, for a period of 21 years from the date of such allotment; that the second clause of section 7 of the said Creek agreement relative to such homestead contains the following provision:

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above," etc., etc.;

that said Agreement was enacted into law by Act of Congress approved March 1, 1901, and duly ratified by the Creek Nation as provided for therein.

Plaintiff further states that prior to the time that any allotments were made as provided in the aforesaid Agreement and Act of Congress, another convention was held between the United States of America and the said Creek Tribe of Indians composed of the Commission to the Five Civilized Tribes representing the Government of the United States on the one part and Pleasant Porter, Principal Chief, Roley McIntosh, Thomas W. Perryman, Amos McIntosh and David M. Hodge, a commission duly appointed to represent the Creek Nation on the other part, as the contracting parties, which entered into a Supplemental and final agreement which was enacted into law by Act of Congress approved June 30, 1902, and duly ratified by the Creek Tribal Council, July 26, 1902, such ratification having been duly proclaimed by the President August 8, 1902, all as contemplated therein, which Supplemental Agreement upon the considerations aforesaid contains, among other things, the following provisions and covenants:

SEC. 16. "Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

SEC. 21. "This agreement shall be binding upon the United States and the Creek Nation, and upon all persons affected thereby when it shall have been ratified by Congress and the Creek National Council, and the fact of such ratification shall have been proclaimed as hereinafter provided."

Plaintiff further states that, in pursuance of the said Agreements, the Acts of Congress ratifying same and the proclamation as aforesaid, this plaintiff in conformity with all the laws, regulations and rules prescribed in reference thereto, duly made selection of an allotment as provided by said Agreement of 160 acres of the communal lands of said Tribe; and that thereafter on the 12th day of December, 1902, a separate deed was executed to her as provided in the said Agreements for the homestead so selected by her from her said allotment; that the homestead so selected is the Northeast quarter of the Southeast quarter of Section Twenty-two (22) Township Eighteen (18) North, Range Twelve (12) East, containing 40 acres lying and situate in the County of Tulsa and State of Oklahoma; and that the deed issued to her and signed by the Principal Chief of the Creek Nation and the Secretary of the Interior as provided by said Agreement also contains, as required thereby, the stipulation and covenant that the said homestead shall be nontaxable, inalien-

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able and free from any incumbrance whatever for 21 years from the date of the said deed, the said covenant so contained in said deed being as follows:

"Said land shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years;"

that said deed was duly delivered to this plaintiff and accepted by her on the 5th day of January, 1904, and is duly recorded in the office of the Commission to the Five Civilized Tribes in Book F, at page 375, and that ever since said deed was executed this plaintiff has continued to own in fee simple and occupy and does now own
21 and occupy the lands above described as her homestead; and that a copy of said deed is filed herewith and made a part hereof and marked Exhibit "A."

Plaintiff further states that by reason of the said Agreements entered into between the United States of America and the Creek Tribe of Indians as aforesaid, and the execution and delivery to her of the deed of conveyance to the homestead aforesaid containing the condition and covenant that the said homestead should be exempt from taxation for a period of 21 years as provided in said Agreements and Acts of Congress, plaintiff has acquired a vested property right and interest in the said exemption which is inviolable and that the same is an exemption, immunity, privilege, grant, franchise and right of great value; that upon the acceptance of the deed to her allotment as aforesaid, plaintiff alleges that the agreement and contract entered into as aforesaid between the Government and said Tribe has been and become fully performed and executed; and that by the terms of said agreements, on the execution and acceptance of said deed, both the Government and the said Tribe relinquished all right, title and interest in and to said allotment, and this plaintiff relinquished all her right, title and interest in and to the said tribal property, allotted and to be allotted under said Agreements; that the tribal interest so relinquished by plaintiff was relinquished upon the consideration of the express covenants in said agreements, to-wit,—that the plaintiff should have the fee simple title in her said allotment free of any and all right, title and interest of the United States and said Tribe therein and also have the said homestead exempt from taxation for the said period of twenty-one years, and that the said covenants should be binding upon the United States and the Creek Nation and all persons affected thereby; that by reason in part of the guarantee by the Government, of the perpetual use and occupancy of said lands to the Tribe, her interest in the said lands and properties, as such member and citizen of said Tribe as aforesaid, was of great pecuniary value and that such
22 property interest was daily becoming more and more valuable by reason, not only of the constant increase in the value of the land and the accumulation of the surplus fund of said Tribe, but because of the constantly diminishing number of persons who could participate and share therein.

Plaintiff further alleges that the people of Oklahoma in pursuance of an Act of Congress approved June 16, 1906, as amended by Act of Congress approved March 4th, 1907, commonly called the En-

abling Act duly adopted as provided therein a constitution for the proposed State of Oklahoma which constitution under proclamation of the President of the United States bearing date of November 16, 1907, was declared to be in conformity with the Enabling Act and then and therefrom became of binding force and a fundamental law of the said State of Oklahoma; that Section 270 of the said constitution adopted and proclaimed as aforesaid contains, among other things, the following provisions:

"All property owned by —— ——, etc., shall be exempt from taxation, and such property as may be exempt by reason of the treaty stipulations existing between the Indians and the United States Government or by Federal laws, during the force and effect of such treaties or Federal laws."

That the said constitution was adopted by the people of Oklahoma, proclaimed and became a law long after the making of the agreements and the passage and approval of the law aforesaid, under which the restrictions and exemption from taxation were guaranteed to this plaintiff and others of her degree of blood, etc., as hereinbefore alleged and that the said laws and agreements imposing restrictions covenanting and granting exemption from taxation as aforesaid were subsisting in valid laws and fully executed agreements at the time the said constitution was adopted. That because of such laws and agreements and the said provision of the constitution of Oklahoma, the allotment of this plaintiff is exempt from
23 taxation and not subject to levies, charges, assessments and taxes under any laws of the State of Oklahoma or of the United States.

Plaintiff further states that, notwithstanding the foregoing covenants and agreements, an Act of Congress, approved May 27, 1908 entitled, "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes," was passed, without the consent or approval of said Tribe or this plaintiff, which provided in Section 1 thereof, among other things, as follows:

"That from and after sixty days from the date of this act the status of the lands allotted heretofore, or hereafte- to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian *bolld* including minors shall be free from all restrictions."

and it is further provided among other things, in Section 4 of said Act as follows:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all *oother* civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes:"

and plaintiff states that she is a Muskogee (Creek) Indian and of less than one-half Indian blood, and among the number of those from whose homesteads restrictions were removed by the above

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provision of said Section 1. But the plaintiff states and avers that said act of Congress, and more particularly the said provision of Section 4 thereof, in so far as the same attempts to deprive this plaintiff of the exemption right, privilege, franchise, grant and immunity guaranteed and covenanted to her in the said Agreements, Acts of Congress and deed aforesaid, would impair the obligation of the said contract and agreement and is, therefore, unconstitutional and void being in violation of and repugnant to Section 10 of Article 1 of the Constitution of the United States; and is further unconstitutional and void for the reason that it would deprive this
24 plaintiff of her property, interest and property right in violation of the fifth and fourteenth Amendments to the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law.

Plaintiff further states that the defendant, H. T. Richardson is the duly elected, qualified and acting Treasurer of the County of Tulsa in the State of Oklahoma; that one C. F. Rogers is the County Clerk of said Tulsa County, and that heretofore, to-wit, on the †16th †July 28th day of September 1909, the regularly constituted officers charged with such duties in regard to taxable property in the said County of Tulsa assessed and levied a tax for State and County purposes upon the said homestead of this plaintiff in the amount and 14.19† sum of $[15.65]*† and that said tax is now an incumbrance, charge, and cloud upon the title of same, and that the said County Clerk listed the said homestead upon the tax list and roll of the said County and over his warrant placed said list in the hands of the said defendant, the Treasurer of the County aforesaid, for collection and enforcement against the said homestead of this plaintiff; that the defendant, said County Treasurer, is now threatening and attempting to collect the said tax and is threatening and attempting and about to involve this plaintiff in additional large expense by way of penalties for delinquency on her refusal to pay the same and is attempting and threatening and about to institute proceedings to collect the said tax and is threatening and about to advertise and sell, and unless enjoined will advertise and sell, the said property at public auction to satisfy the lien thereof, all to the very great damage, and irreparable injury of this plaintiff, and in violation of her rights under the exemption aforesaid. And plaintiff further states and avers that the acts and conduct of the said defendant as aforesaid are without authority of law, illegal and void and that her said homestead is exempt from taxation and not subject to pay the
25 taxes so assessed and levied upon and against it under any law of the State of Oklahoma or of the United States; that any law of the said State or of the United States authorizing or attempting to authorize the taxation of the said homestead is in violation of the said exemption rights of this plaintiff under the Agreements and Acts of Congress aforesaid and in conflict with the

[† In pencil in copy.]
[* Figures enclosed in brackets erased in copy.]

said Section 10 of Article 1, and said Amendments 5 and 14 of the Constitution of the United States, and, therefore, void, and of no force and effect adverse to such rights.

Wherefore, the premises considered, plaintiff prays for a permanent injunction against the defendant, H. T. Richardson, perpetually enjoining and restraining him from enforcing or attempting to enforce the taxes assessed and levied against plaintiff's property as aforesaid, and enjoining the defendant from instituting proceedings of any kind or character to enforce the said tax; and plaintiff further prays for a decree of this Court cancelling the lien of said tax upon her property as aforesaid and that, pending the hearing hereof, a temporary restraining order and injunction be granted by this Honorable Court restraining and enjoining him, the said defendant, from enforcing or attempting to enforce said tax until the further and final order of this Court, and that plaintiff have judgment against the defendant for her damage and costs of this action and for all further and other proper relief not herein specifically prayed.

W. L. STURDEVANT,
GRANT FOREMAN,
Attorneys for Plaintiff.

26 STATE OF OKLAHOMA,
Tulsa County, ss:

Bessie Brown English, of lawful age, being first duly sworn, says: that she is the plaintiff above named, that she has heard read the foregoing petition and knows the contents thereof, and that the facts therein set forth are true.

BESSIE BROWN ENGLISH.

Subscribed and sworn to before me this 4th day of November, 1909.

HERSCHEL B. HAMILTON,
Notary Public.

My commission expires April 5, 1910.

That said petition bears the following endorsement:

No. 1664. District Court, Tulsa County. Bessie Brown English vs. H. T. Richardson, Co. Treas. of Tulsa County. Petition. Filed Nov. 19, 1909. W. W. Stuckey, Clerk District Court. W. L. Sturdevant and Grant Foreman, Attorneys for Plaintiff.

27 Vol. —.

Homestead Deed No. 6930. *Creek Indian Roll No.* 2960.

The Muskogee (Creek) Nation (formerly Indian Territory), Oklahoma.

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901,

COPY

it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Bessie Brown, a citizen of said tribe, as a homestead.

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Bessie Brown, all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz: The Northeast Quarter of the South East Quarter of Section 22, Township 18 North, and Range 12 East of the Indian Base and Meridian, in Oklahoma, containing 40 acres, more or less, as the case may be according to the United States survey thereof, subject, however, to the conditions, provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and
28 free from any incumbrance whatsoever for twenty one years; and subject, also, to provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said Bessie Brown and subject, also, to all provisions of said Act of Congress, relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902. (Public No. 200.)

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 12th day of December, 1902.

P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior.

Approved January 27, 1903.
THOMAS RYAN,
Acting Secretary.

Exhibit "A."

Recorded in Book F, Page 375.
February 25, 1903.
Commission to the Five Civilized Tribes.
TAMS BIXBY,
Commissioner.

29 That on November 19, 1909, præcipe for summons was filed in said Court by the plaintiff, which præcipe, together with the endorsement thereon, is in the words and figures following, to-wit:

Præcipe for Summons.

In the District Court of Tulsa County, State of Oklahoma.

No. —.

BESSIE BROWN ENGLISH
vs.
H. T. RICHARDSON.

To the Clerk of said Court:

Issue Summons in the above entitled cause, and direct the same to the Sheriff of Tulsa County, State of Oklahoma, or to the defendant, H. T. Richardson.

Amount claimed, $— and interest from the — day of —— 190– at — per cent per annum.

Action brought for Injunction.

Make summons returnable 29th day of November, A. D. 1909.

Defendants required to answer on or before the 19th day of December, 1909.

Dated this 19th day of November, A. D., 1909.

W. L. STURDEVANT,
GRANT FOREMAN,
Attorney- for Plaintiff.

No. 1664. District Court, Tulsa County, Oklahoma. Præcipe for summons. Bessie Brown English, vs. H. T. Richardson. W. L. Sturdevant, Grant Foreman, Attorneys. Filed Nov. 19,
30 1909. W. W. Stuckey, Clerk District Court.

That thereafter, on the 19th day of November, 1909, Summons was issued out of the office of the Clerk of said Court, and afterward, on the 20th day of November, 1909, said Summons was filed in this cause, which Summons, together with the endorsement and return thereon is in the words and figures following, to wit:

31 *Summons.*

STATE OF OKLAHOMA,
Tulsa County, ss:

In District Court.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, Defendant.

The State of Oklahoma to the Sheriff of Tulsa County:

You are hereby commanded to notify H. T. Richardson, that he has been sued by Bessie Brown English for Injunction in the Dis-

COPY

trict Court of Tulsa County, Oklahoma, and that he must answer the petition of said Bessie Brown English, filed against him in said Court, in the City of Tulsa, in said County, on or before the 19th day of December, 1909, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 29th day of December, A. D., 1909.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Tulsa, in said County, this 19 day of November, A. D., 1909.

[SEAL.]

W. W. STUCKLEY, *Clerk*,
By J. A. LASWELL, *Deputy*.

Sheriff's Return.

STATE OF OKLAHOMA,
Tulsa County, ss:

Received this Writ Nov. 19, 1909, at — o'clock —. M., and served the same upon the following persons, defendants,
32 within named, at the times following, to-wit: H. T. Richardson, on Nov. 19, 1909, by delivering to said defendant, personally in said County, a true and certified copy of the within summons, with all the endorsements thereon.

H. F. NEWBLOCK, *Sheriff*,
By J. J. MORAN, *Under Sheriff*.

Sheriff's Fees.

Service and return, first person	.50
1 copy Summons	.25
Total	.75

No. 1664. App. Docket 3, Page 448. In District Court. Summons. Bessie Brown English vs. H. T. Richardson. Issued Nov. 19, 1909. Returnable Nov. 29, 1909. Ans. Due Dec. 19, 1909. W. L. Sturdevant & Grant Foreman, Attorney- for Plaintiff. Filed Nov. 20, 1909. W. W. Stuckey, Clerk District Court.

33 That afterwards, on the 13th day of December, 1909, the defendant H. T. Richardson filed herein his demurrer, which, together with the endorsements thereon, is in the words and figures following, to-wit:

In the District Court within and for Tulsa County, Oklahoma.

#1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant.

Demurrer.

Comes now the defendant in the above styled and entitled cause and demurs to the petition of the plaintiff upon the grounds that the same does not state facts sufficient to constitute a cause of action against the defendant.

M. A. BRECKINRIDGE.
Attorney for Defendant.

1664. Dem. Filed in open Court Dec. 13, 1909. W. W. Stuckey, Clerk District Court.

34 That afterwards, on the 1st day of April, 1910, said cause was argued before the Court and Submitted, and the decree of the Court was entered therein, which decree, together with the endorsements thereon, is in the words and figures following, to-wit:

35 STATE OF OKLAHOMA,
County of Tulsa, ss:

In the District Court in and for said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant.

Decree.

And now on this 1st day of April, 1910, this cause coming on to be heard by the court upon the petition filed herein on November 19, 1909, by the plaintiff, Bessie Brown English, and the demurrer of the defendant, H. T. Richardson, to the petition of the plaintiff, and the plaintiff appearing by her attorneys, W. L. Sturdevant and Grant Foreman, and the defendant H. T. Richardson as County Treasurer of Tulsa County appearing by his attorney, M. A. Breckinridge, the duly elected and qualified County Attorney for Tulsa County, the cause was argued and submitted to the court upon said petition and demurrer and the court having read the petition of the plaintiff and the demurrer of the defendant and having heard argument of counsel and being fully advised in the premises finds

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that the said petition does not state facts sufficient to constitute a cause of action against the defendant and that therefore the demurrer of the defendant is well taken and should be sustained.

36 In consideration of the premises, therefore, it is by the Court considered, adjudged and decreed that the said demurrer to the petition be, and the same is, hereby sustained. Whereupon the plaintiff refuses to amend her petition or to plead further but elects to stand upon her petition, and it is therefore considered, adjudged and decreed that the plaintiff's said petition be dismissed for want of equity and it is further considered, adjudged and decreed that the defendant herein have judgment against the plaintiff for his costs in this behalf expended.

To the entering of which decree, sustaining the demurrer, dismissing the plaintiff's petition, and awarding judgment to the defendant against the plaintiff for defendant's costs herein, the said plaintiff Bessie Brown English excepts, and prays an appeal therefrom to the Supreme Court of the State of Oklahoma, which is by the Court allowed upon the plaintiff's giving an appeal bond in the sum of One Thousand Dollars within thirty days from this date; and ninety (90) days is given plaintiff within which to prepare and serve her casemade on the defendant and ten (10) days after service is allowed defendant to suggest amendments, and five (5) days thereafter is allowed in which to have the same settled and signed.

L. M. POE,
Judge of the District Court.

#1664. Bessie Brown English vs. H. T. Richardson, County Treasurer of Tulsa County. Decree. Filed April 1, 1910. W. W. Stuckey, Clerk District Court.

37 That afterward, on the 6th day of April, 1910, the plaintiff filed herein her appeal bond, which bond, together with the endorsements thereon, is in words and figures following, to-wit:

38 STATE OF OKLAHOMA,
County of Tulsa, ss:

In the District Court in and for Said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

Bond.

Know all men by these presents, That Bessie Brown English, as Principal Obligor, and Southern Surety Company, as Sureties, are held and firmly bound unto H. T. Richardson, County Treasurer

of Tulsa County, Defendant, in the above entitled cause, in the sum of One Thousand Dollars, ($1,000.00), for the payment of which, well and truly to be made, we and each of us do hereby jointly and severally bind ourselves, our heirs, executors, administrators and assigns.

Dated this 5th day of April, 1910.

The condition of the above obligation is such that,

Whereas: On the 1st day of April, 1910, a decree was rendered herein in favor of the said obligee, H. T. Richardson, County Treasurer of Tulsa County, the defendant herein and against Bessie Brown English, the principal obligor, plaintiff in said cause, sustaining the defendant's demurrer, dismissing the plaintiff's petition and awarding the defendant judgment for costs, and

Whereas: Said plaintiff Bessie Brown English has taken an appeal from said decree and judgment to the Supreme Court of Oklahoma,

39 Now, Therefore, If the said principal obligor herein shall pay to the said obligee all costs and all damages of said defendant in said case, if the judgment or final order shall be adjudged against her, and the decree of the District Court affirmed, then this obligation shall be void, otherwise to remain in full force and effect.

BESSIE BROWN ENGLISH, *Principal.*
SOUTHERN SURETY COMPANY.
[SEAL.] By E. G. DAVIS, *Secretary,*
Sureties.

STATE OF OKLAHOMA,
——— *County, ss:*

The undersigned, sureties on the foregoing bond, being duly sworn, on oath each for himself says: I am a resident householder and freeholder within the State of Oklahoma, and have property within said State worth over and above all my just debts and liabilities, exclusive of property exempt from execution, the sum set out and stated below, that is to say:

I, —— —— am worth the sum of $——
I, —— —— am worth the sum of $——
I, —— —— am worth the sum of $——

—— ——
—— ——
—— ——

Subscribed and sworn to before me this — day of M——, 1910, which said bond was approved by the District Clerk and endorsed as follows: No. 1664. District Court, Tulsa County. Bessie Brown English vs. H. T. Richardson, Co. Treas. Tulsa County. Bond. W. L. Sturdevant and Grant Foreman, Attorneys for Plaintiff. Filed Apr. 6, 1910. W. W. Stuckey, Clerk District Court. This bond approved this 6th day of April, 1910, W. W. Stuckey, Clerk District Court, by J. A. Laswell, Deputy.

40 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court in and for Said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

Certificate of Attorneys.

We hereby certify that the foregoing casemade contains a full true correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had; all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete Casemade.

Witness our hands this 6th day of April, 1910.

W. L. STURDEVANT,
GRANT FOREMAN,
Attorneys for Bessie Brown English.

41 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court in and for Said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

Acceptance of Service.

I, the undersigned attorney for H. T. Richardson, County Treasurer of Tulsa County, in the foregoing suit, certify that the foregoing Casemade was duly served on us this 6th day of April, 1910.

M. A. BREKINRIDGE,
Attorney for H. T. Richardson, County Treasurer, Tulsa County.

42 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court in and for Said County and State.

No. 1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

Stipulation of Attorneys.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing casemade contains a full, true, correct and complete copy and transcript of all the proceedings in said cause including all pleadings filed and proceedings had, all the orders and rulings made and exceptions allowed and all of the records upon which the judgment and journal entry in said cause were made, and the same is a full, true, correct and complete casemade; and the said defendant waives the right to suggest amendments to said casemade and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the plaintiff that the judge of said court settle the same and order the same certified to the clerk of the District Court and filed according to law; and said defendant hereby waives the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

W. L. STURDEVANT,
GRANT FOREMAN,
Attorneys for Bessie Brown English.

M. A. BRECKINRIDGE,
Attorney for H. T. Richardson,
County Treasurer, Tulsa County.

April 6, 1910.

Filed June 9, 1910. W. H. L. Campbell, Clerk.

43 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court In and For Said County and State.

1664.

BESSIE BROWN ENGLISH, Plaintiff,
vs.
H. T. RICHARDSON, County Treasurer, Tulsa County, Defendant.

This is to certify that the foregoing above casemade and the amendments thereto have been duly served in due time, and the

amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, findings, proceedings, and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the clerk of the District Court attest the same with the seal of said Court, and file the same of record:

Witness my hand at Tulsa, this 6th day of April, 1910.

L. M. POE,
Judge of the District Court.

Attest:

W. W. STUCKEY,
Clerk District Court, [SEAL.]
By J. A. LASWELL, *Deputy.*

Said Casemade is endorsed as follows:

1761—Supreme Court of Oklahoma—Bessie Brown English, Plaintiff in error, v. H. T. Richardson, as County Treasurer of Tulsa County, Defendant in error. Petition in error. Filed June 9, 1910. W. H. L. Campbell, Clerk. W. L. Sturdevant and Grant Foreman, attorneys for plaintiff in error.

44 In the Supreme Court of the State of Oklahoma.

No. 1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer, of Tulsa County, Defendant in Error.

To the Honorable the Chief Justice and the Justice of Said Court:

Comes now the plaintiff in error, Bessie Brown English, by her attorneys, W. L. Sturdevant and Grant Foreman, and moves the Court for an extension of the time within which to file her briefs herein to the 13th day of September, 1910, and as her grounds for said motion shows as follows:

The plaintiff in error represents that as the questions involved in this cause are of wide public interest and the early determination thereof of great importance to all the people of the State of Oklahoma, it is the intention of her attorneys to file herein a motion to advance said cause for consideration at the sitting of this Court, in September, 1910, and it is the intention to file with said motion the briefs in support of the petition in error, after serving copies of briefs on opposing counsel.

And for further ground the plaintiff in error states that by reason of professional engagements her attorneys find it exceedingly incon-

venient and difficult to prepare the briefs within the time limited by the rules, and they feel that they will need all the time asked for herein, to enable them properly to present a matter of so great importance as that involved in the issues herein.

W. L. STURDEVANT,
GRANT FOREMAN,
Attorneys for Plaintiff in Error.

45 STATE OF OKLAHOMA,
Muskogee County, ss:

Grant Foreman, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in error herein; that he has read the foregoing motion by him subscribed, and that the matters and things therein set forth are true.

GRANT FOREMAN.
Attorney for Plaintiff in Error.

Subscribed and sworn to before me, this the 15th day of July, 1910.

W. M. BONNER,
[SEAL.] *Dep. Clerk Supreme Court.*

I hereby accept service of the above motion, and I hereby consent that said motion be allowed.

This the 14th day of July, 1910.

M. A. BRECKENRIDGE,
Attorney for H. T. Richardson, Defendant in Error.

Filed July 15th, 1910.
W. H. L. CAMPBELL, *Clerk.*

46 And thereafter, to-wit, on the 19th day of July 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, July Term, 1910, July 19th, 1910, Fourth Judicial Day.

#1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, etc., Defendant in Error.

And now on this day it is ordered by the court that the motion herein of plaintiff in error for extension of time to September 13th, 1910, to file briefs, be, and the same is hereby allowed.

47 In the Supreme Court of the State of Oklahoma.

No. 1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Oklahoma, Defendant in Error.

To the Honorable the Chief Justice and the Associate Justices of said Court:

Comes now the plaintiff, Bessie Brown English, by her attorneys, W. L. Sturdevant and Grant Foreman, and respectfully moves this Honorable Court for an order to advance this cause and set the same for the 13th day of September, 1910, and for grounds of said motion the plaintiff shows as follows:

This action was brought in the Trial Court to enjoin the defendant in error, H. T. Richardson, as County Treasurer of Tulsa County, from taking any steps to subject to taxation the homestead of plaintiff, a citizen of the Creek Nation, because it was claimed by the plaintiff that said homestead is exempted by treaty stipulations from taxation and that said exemption is a vested property right of the plaintiff, which cannot be impaired by any law of the State of Oklahoma, attempting to tax the same.

That upon issue joined the Court below held that the plaintiff could not maintain his action, from which decision this appeal was taken. That the issue presented to this Court by this appeal is one of vast imprortance to the State, and to the plaintiff in error and to a vast number of citizens of the Creek Nation similarly situated, as it involves the right of the State to tax a large part of the area of seven counties in the State of Oklahoma owned by Creek citizens, and it is highly desirable to all the parties and interests in-

48 volved that an early hearing and decision of this case be had.

That the attorneys for plaintiff in error have filed in this Court two other kindred cases to this as they involve similar questions of law.

Plaintiff in error shows further that on August 24, 1910, this Honorable Court made an order advancing and setting for hearing on September 13, 1910, case No. 1877, appealed from Pittsburg County, involving issues similar to those in this case, and the plaintiff believes that it is to the interest of the parties to all of such kindred cases that they be submitted and heard at the same time.

The attorneys for plaintiff in error show further that they are now engaged in the preparation of their brief in this case, and expect to have it on file before the 13th day of September, 1910.

Wherefore, the plaintiff respectfully prays that her motion be allowed.

W. L. STURDEVANT,
GRANT FOREMAN,
Attorneys for Plaintiff in Error.

POOR

I hereby accept service on the foregoing motion and agree that the same be allowed, and the cause advanced as prayed.

——— ———,
County Attorney, Tulsa County, and Attorney for Defendant in Error.

49 STATE OF OKLAHOMA,
Logan County, ss:

Grant Foreman, being first duly sworn deposes and says, that he served the foregoing motion upon the attorney for the defendant in error, by depositing a true copy thereof in the post office at Guthrie, properly addressed to M. A. Breckenridge at Tulsa, Oklahoma, and forwarded by registered mail the postmaster's receipt for which is hereto attached, all of which is done this 31st day of August, 1910.

GRANT FOREMAN.

Subscribed and sworn to before me this 31st day of August, 1910.
[SEAL.] RUEL HASKELL, JR.,
Dep. Clerk Supreme Court.

Letter No. 1632. P. O., Guthrie, Okla.

Received for registration August 31, 1910, from Grant Foreman, Muskogee, Okla., addressed to M. A. Breckenridge, Co. Att'y, Tulsa, Okla.

POSTMASTER.
Per JAS. H. NEHER.

1 class postage prepaid.

Filed August 31st, 1910. W. H. L. Campbell, Clerk.

50 And thereafter, to-wit, on the 6th day of September, 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, July Term, 1910, September 6th, 1910, Eleventh Judicial Day.

#1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, Co. Treas., Defendant in Error.

And now on this day, it is ordered by the court that the above cause be, and the same is hereby advanced, and the cause to be set when briefs of both parties are filed and set with cases #1794, #1795 and #1877.

51 And thereafter, to-wit, on the 12th day of January, 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

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Supreme Court, January Term, 1911, January 12th, 1911, Third Judicial Day.

#1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer, Defendant in Error.

And now on this day the above cause is argued orally and the cause submitted on the record and briefs, and oral argument.

52 And afterwards, at the March, 1911, Term of said Supreme Court, on the Twenty-first day of March, 1911, the following proceeding was had in said cause, to wit:

#1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Oklahoma, Defendant in Error.

And now, this cause coming on for determination by the Court upon the record, briefs and oral argument herein, and the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, and it is

Ordered by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed.

Opinion by Dunn, J.; Turner, C. J., Williams and Hayes, JJ., concur; and Kane, J., dissents.

53 & 54 Copy.

In the Supreme Court of the State of Oklahoma.

(Filed 21st Day of March, 1911.)

No. 1761.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Oklahoma, Defendant in Error.

Syllabus.

Section 4 of an Act of Congress of May 27, 1908, (ch. 199, 35 Stat. L. 312-313) entitled, "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and

for other purposes," is valid, and under and by virtue thereof, the lands of all allottees, of the Five Civilized Tribes of Indians from which restrictions have been or shall be removed, are subject to taxation under the general laws of the state equally with the property of all other persons.

Error from the District Court of Tulsa County.

L. M. Poe, Trial Judge.

Affirmed.

W. L. Sturdevant and Grant Foreman, Attorneys for Plaintiff in Error.

Charles West, Attorney General, and Charles L. Moore, Assistant Attorney General, Attorneys for Defendants in Error.

Opinion of the Court by Dunn, J.

The above entitled cause presents error from the district court of Tulsa county. The issues presented are identical in all respects with those of the case of Gleason v. Wood, except as the same are applicable to the allottees of the Creek or Muskogee Tribe of Indians, and the opinion of the court in that case is adopted and promulgated as the opinion in this case.

The judgment of the trial court sustaining a demurrer to the petition is accordingly affirmed.

Turner, C. J., Williams and Hayes, JJ., concur; Kane, J., dissents.

55 Copy.

In the Supreme Court of the State of Oklahoma.

(Filed 21st day of March, 1911.)

No. 1877.

MICHAEL H. GLEASON, et al., Plaintiffs in Error,
vs.
J. I. WOOD, County Treasurer of Pittsburg County, Oklahoma, et al., Defendants in Error.

Syllabus.

Section 4 of an Act of Congress of May 27, 1908, (ch. 199, 35 Stat. L. 312-313) entitled, "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," is valid, and under and by virtue thereof, the lands of all allottees of the Five Civilized Tribes of Indians from which restrictions have been or shall be removed, are subject to taxation under the general laws of the state equally with the property of all other persons.

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Error from the Superior Court of Pittsburg County.

P. D. Brewer, Trial Judge.

Affirmed.

McCurtain & Hill, and W. L. Sturdevant, Attorneys for Plaintiffs in Error.

Charles West, Attorney General, and Charles Moore, Assistant Attorney General, Attorneys for Defendants in Error.

56 *Opinion of the Court, by Dunn, J.*

This case presents error from the Superior Court of Pittsburg County, the plaintiffs being citizens and members and the original allottees of the Choctaw Tribe of Indians, and holding allotments of lands in several different counties of the state. The action is brought to enjoin and restrain the defendants as treasurers of these counties from collecting or attempting to collect taxes on said lands for the year 1909. It is contended by counsel that the allotted lands of the Choctaw Tribe of Indians cannot be taxed so long as the title remains in the original allottee not to exceed twenty-one years from the date of the patent. That by Sec. 29 of an act of Congress of June 28, 1898, (30 Stats. L. 495) generally known as the Atoka Agreement, the United States government made a valid and enforceable contract between itself and the Choctaw nation, and that among the terms of said contract was the provisions that "all the lands allotted shall be non-taxable while the title remains in the original allottee but not to exceed twenty-one years from date of patent." That this agreement was ratified by a vote of the Choctaw Tribe of Indians and all of the provisions contained therein were adopted by them, and it is claimed that the exemption from taxation was a part of the consideration to them for entering into the same. That the exemption was not a gratuity or privilege, but on its vesting, became a property right, based upon a sufficient consideration, accepted by both parties which could not be taken away by subsequent legislation. It is further contended that the constitution of the state of Oklahoma, adopted in 1907, recognized the force and validity of this contract in Sec. 6, of art. 10, (p. 289 Snyder's Const.) wherein it is provided that:

"All property owned," etc. * * * "shall be exempt from taxation, and such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States
57 government, or by Federal laws during the force and effect of such treaties or Federal laws."

It is claimed that herein was a recognition and ratification by the state of Oklahoma, of the act of Congress above referred to, which constituted a contract between the state and the Indians which could not be abrogated by subsequent acts of Congress. May 27, 1908, Congress passed an act (ch. 199, 35 Stat. L. 312), entitled, "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," among the provisions of which are the following:

SEC. 1. "That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions * * *."

Section 4 of said act provides:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes * * *."

Plaintiffs state that they and they for whom they sue are members of the Choctaw Tribe of Indians, and Choctaw citizens, and original allottees enrolled as of September 25, 1902, and are among the number of those from whose allotments restrictions were removed by the above provisions. To the petition filed setting forth in full the facts upon which reliance is placed to recover, a general demurrer was filed which, in due course, was heard by the court and sustained, and the case has been lodged in this court for review.

The question raised is, after these lands had been taken, under the terms and provisions of the allotment acts agreed to by the members of the different tribes, which provided exemption from taxation,

did Congress have the power to remove the restrictions and to
58 subject them under the act of May 27, 1908, to taxation and all civil burdens as though they were the property of other persons than the allottees of such tribes.

In an action arising in the Creek Nation, United States v. Shock, recently decided by Judge Campbell of the Eastern District of Oklahoma, but not yet reported, it is said:

"The constitution of this state (sec. 270) provides that 'such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States government, or by Federal laws, during the effect of such treaties or Federal laws, shall be exempt from taxation.' Congress, by the act of April 26, 1906, (34 Stat. 137), provided: 'That all lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation as long as the title remains in the original allottee.' The last mentioned act, as its title indicates, is to provide for the final disposition of the affairs of the Five Civilized Tribes, and the lands referred to in the provision above mentioned are the lands allotted to members of the Five Civilized Tribes, the subject of the tax here involved. By act of May 27, 1908, (35 Stat. 312) it was further provided: 'That all lands from which restrictions have been or shall be removed, shall be subject to taxation and all other civil burdens, as though it were the property of other persons than allottees of the Five Civilized Tribes.' From this it is clear that regardless of prior legislation or treaties the intention and policy of Congress as expressed by the two acts last referred to, was that so long as these allotted lands remain subject to any restrictions upon alienation, they shall not be taxed by the state, but whenever all restriction upon

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alienation shall be removed, then such lands shall be subject to taxation, and other civil burdens to which other lands are subjected. Therefore, any attempt on the part of the state to tax restricted lands would be in violation not only of the acts of Congress enacted pursuant to its paramount and sole right to legislate regarding these lands, but would also violate the exemption expressed in the state constitution. In view of the purpose which prompted Congress, in the first instance, to place restrictions upon the alienation of these allotted lands, and in view, also, of the purpose of Congress, as expressed in the act of 1893, providing for the Dawes Commission, and various subsequent acts, to prepare what was then the Indian Territory for statehood, with a view to the establishment of a state at an early date, which has now been accomplished, it is entirely reasonably that Congress should not have intended the exemption from taxation to exist longer than the time during which the lands were inalienable. Goudy v. Meath, 203 U. S. 146. Therefore the complainant in this case cannot successfully contend that the lands of any particular class of Creek allottees were exempt from taxation by the state at any particular time, unless it appears that at such time the lands were inalienable by reason of restrictions still existing upon their alienation."

While the foregoing expresses the policy of Congress and hold that the lands from which the restrictions have been removed are available for taxing purposes by the state, the questions pre-
59 sented to us appear to have been assumed rather than considered at length, yet we believe after a full consideration of the authorities that Judge Campbell is amply sustained in the conclusion to which he came. The people of the state in the adoption of the terms of the Enabling Act in effect have disclaimed any right or authority to limit or affect the power of the government to make any law or regulation respecting Indians, their lands, property or other rights which the government might have made, had the territory embracing the same not been created into a state, and has held as exempt the property of the Indians in accordance with the treaties or Federal laws relating thereto during the force and effect of the same. So that the general laws relating to the taxation of all property within the state for the purposes of state and municipal government under the provisions of the Enabling Act and the constitution, were suspended from operating upon these lands so long as they were held inalienable and exempt from taxation by the laws of Congress. On Oklahoma coming in as a state it yielded the right to the Federal government to legislate as to this property of either absolving it from taxation or by removing the exemption, thereby bring- it within the operation of the general taxing system of the state. When, therefore, Congress acted and the exemption was removed, the state's power to tax by operation of law immediately attached. This, it occurs to us, is the extent, force and effect of the provisions of the Enabling Act and the constitution. The state entered into no contract with the Indian Tribes or the members thereof. It made no agreement, and it received naught from them as a consideration for the relief which they here demand. Its sole contract in reference to

these matters was with Congress wherein it agreed that it would recognize and respect its legislation. So long as Congress maintained the laws under which these lands were exempt, the state under this agreement was required to recognize the same, but when Congress repealed them, and rendered the lands the same as those of
60 all other citizens of the state, there was no broken pledge on its part when it enforced the same laws with reference to these lands that it did on those of all others.

But, it is contended that before there was a state, the members of these tribes and the allottees, had taken title to these lands under and by virtue of the terms of a valid contract; that the right of exemption from taxation was a vested property right growing out of a compliance on the part of these plaintiffs with the terms of that contract of which Congress lacked the power to strip them. It must be conceded that the treaties under which the lands were allotted, so far as they were legislative in character, were merely statutes. Hence a statute conflicting therewith subsequent thereto superseded them. Horner v. United States et al., 143 U. S. 570, 36 Law ed. 266; The Cherokee Tobacco, 11 Wall. 616, 20 Law Ed. 227; Thomas et al. v. Gay et al., 169 U. S. 264, 42 Law ed. 740; Stephens et al. v. Cherokee Nation, 174 U. S. 445, 43 Law ed. 1041; Lone Wolf et al. v. Hitchcock, 187 U. S. 553, 47 Law ed. 299.

Speaking to this general question, the Supreme Court of the United States in the case last cited, (Lone Wolf et al. v. Hitchcock), said:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Case, 130 U. S. 581, 600, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623), the legislative power might pass laws in conflict with treaties made with the Indians. (Citing authorities). * * * The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. In United States v. Kagama (1885) 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109, speaking of the Indians, the court said * * *. 'The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their
61 protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has

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existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in Choctaw Nation v. United States, 119 U. S. 1, 27, 30 Law ed. 306, 314, 7 Sup. Ct. Rep. 75, and Stephens v. Choctaw Nation, 174 U. S. 445, 483, 43 Law ed. 1041, 1054, 19 Sup. Ct. Rep. 722."

Whether the act removing restrictions and subjecting these lands to taxation was one in perfect good faith towards the Indians, is a question which should be addressed to Congress for as we view the same, unless there was a valid contract, the power under all the authorities existed. At the time of the making of the treaties and passage of the acts of Congress within which the exemptions referred to are provided for, Congress was vested with the full authority to fix the terms of the same. As was held by the authority from which we last quoted, Congress from the beginning has exercised plenary authority over the tribal relations of Indians. Not only has this power been exercised over the tribal affairs, but it is extended to the property of the members and the disposition thereof, its tenure, title, and all rights growing out of it. The individual interest therein which has been given has been by virtue of its plenary legislative authority and the interest and title withheld has been under the same power. For, as was said by Judge Hook in Ligon, et al. v. Johnston et al., 164 Fed. 670: "The disposition of the tribal property of the Indian tribes falls within the legislative domain, the power of Congress is supreme, and its action is conclusive upon the courts," citing Cherokee Nation v. Hitchcock, supra, and Lone Wolf v. Hitchcock, supra. See also Hayes v. Barringer, 168 Fed. 221, and Wallace, et al. v. Adams et al., 143 Fed. 716. Therefore, being vested with this plenary authority there was naught in the nature of a consideration possessed by the members of the different tribes, which they could yield to Congress as a basis for the claim which is made in this and kindred cases, and in order to enforce a
62 claim of exemption from taxation, the same necessity for a proper consideration exists as if the contract were between private parties. Grand Lodge of the State of Louisiana v. New Orleans, 166 U. S. 143, 41 Law ed. 951. This case was one wherein the Grand Lodge of F. & A. Masons of the state of Louisiana purchased and owned a certain hall in the city of New Orleans. In 1855, the legislature of the state provided by an act for the exemption of said hall from city and parish taxation so long as it was occupied by said lodge. In 1879, a new constitution was adopted by the state of Louisiana under which the same was made taxable, and the authorities proceeded thereunder to tax and sell the said property for the taxes. The lodge brought an action seeking to restrain the collection and the United States Supreme Court held that the act did not constitute a contract and that the property was subject and liable to taxation.

The case of County of Stanislaus et al. v. San Joaquin & King's River Canal etc. Co. 192 U. S. 201, 48 Law ed. 406, was one wherein the defendant in error sought to have held invalid a certain law under which its income from its water rates was sought to be curtailed. In 1862 the California legislature passed an act for the organizing of water companies and provided that the rents or tolls of the same should be subject to regulation by a board of supervisors of the county in which they were situated but that they should not be reduced so low as to fail to yield the stockholders less than one and one-half per cent per month upon the capital actually invested. This company built its canal while this law was in force and effect. Thereafter and in 1885, the legislature passed an act relating to the same subject which provided under its operation for a substantial reduction of the rates claimed under the original act. The Supreme Court of the United States, speaking through Mr. Justice Peckham, held that the company had no contract and said:

63 "In our belief, the language of the act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it."

The case of Welch v. Cook et al., 7 Otto, 541, 24 Law ed. 1112, arose in the District of Columbia. In 1873 the legislative assembly of that District passed an act providing that 'all property, real and personal, which may hereafter be actually employed within the limits of the District of Columbia for manufacturing purposes, shall be exempt from all general taxes for a period of ten years from the date of this act going into effect: Provided, that the value of the property so employed for manufacturing purposes shall not be less than $5,000." Thereafter and on June 20, 1874, Congress repealed the said act. Plaintiff brought his action alleging that on the faith of the act of the legislative assembly he had expended large sums of money in improving his property which was within the provisions of the tax exempting act and that in pursuance of said law the commissioners exempted the same for the year ending June, 1874, but were about to sell the same for taxes for the year 1875 under the act of Congress above mentioned. The court held that no contract was created, that the act was a bounty law which was good as long as it remained unrepealed, but that there was no pledge that it should not be repealed at any time.

In the case of Christ Church v. Philadelphia County, 24 How. 300, 16 L. ed. 602, it appeared that in 1833, the legislature of Pennsylvania passed an act which exempted Christ Church Hospital in the city of Philadelphia, providing, "that the real property, including ground rents, now belonging and payable to Christ Church Hospital in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." In the year 1851, this act was partially repealed and a portion of the real property previously exempted was taxed. Suit was brought to restrain the same and when the case reached the Supreme

64 Court of the United States, it was disposed of in an opinion by Mr. Justice Campbell, wherein it was said:

"The plaintiffs claim that the exemption conceded by the Act of 1833 is perpetual, and that the Act itself is in effect a contract. This concession of the Legislature was spontaneous, and no service or duty, or other remunerative condition was imposed on the corporation. It belongs to the class of laws denominated privilegia favorabilia. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence. Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the state, and must be exerted according to the varying conditions of the commonwealth. The Act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature. * * * It is in the nature of such a privilege as the Act of 1833 confers, that it exists bene placitum and may be revoked at the pleasure of the sovereign."

The case of Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 48 Law ed. 229, likewise involved a claim somewhat similar to the one in the case at bar. May 27, 1893, the legislature of Michigan provided in an act for levying a specific tac on railroads, that the same nor any other law of that state should not apply to any railroad company thereafter building or operating a line of railroad within the state north of a certain parallel, until the same had been operated for a full period of ten years, unless the gross earnings equaled $4,000 per mile. Thereafter a railroad company constructed a road north of the parallel, and its gross earnings never equaled $4,000 per mile and it would have been entitled to the exemptions stated if the law mentioned was in force. In 1897 the state legislature passed an act amending the previous act and under it taxed this road. To a bill setting up these facts a demurrer was filed. In sustaining the power to tax, the Supreme Court of the United States held that no contract, exempting from taxation was made by the act of 1893, and that the levy made was valid.

Two other cases similar to the foregoing are those of Tucker et al. v. Ferguson et al. 22 Wall. 527, 22 L. ed. 805, and West Wisconsin Ry. Co. v. Board of Supervisors, etc. 3 Otto, 595, 23 Law ed.
814. In the former, the court held that "a provision in a
65 state act, exempting lands specified from local taxation for three years, was not a contract." And in the latter case it was held that "an exemption from state taxation, which is a mere gratuity, may be withdrawn whenever the state thinks it best for the public welfare." Both of these cases involve the question of whether a contract was created between the state and certain railroads which were built under the provisions of acts of the legislature exempting certain of their lands from taxation for various periods. In the case last noted it appeared that in 1864 the legislature of Wisconsin passed an act which declared that when the title to the lands in question should become vested in the company they should be exempt from taxation for ten years from the passage of the act. In 1870 the exemption from taxation was further extended for ten

years, the company during this time being engaged in the construction of a railway and selling bonds thereon, upon the faith of the inviolability of the alleged contract exempting its lands from taxation. In 1871, this act was so amended that certain lands of the company were rendered liable for taxation. The company insisted that the lands having been mortgaged pursuant to the first act and the road having been completed within the time limited within the second, there was created a contract protected by the contract clause of the constitution of the United States and that the acts abrogating the exemption were therefore void. In the discussion of the case Mr. Justice Swayne who prepared the opinion for the court, said:

"One who has examined this case cannot look through Tucker v. Ferguson, as reported, without being struck with the similarity of the points and arguments, as well as the substantial identity of the facts, in the two cases. The latter case was carefully considered in all its aspects by this court. It is unnecessary to reproduce at length the views then expressed. In that case we said, 22 Wall., 575: 'The taxing power is vital to the function of government. It helps to sustain the social compact, and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every number of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all.' We hold here, as we held there, that the exemptions in question were gratuities, offered by the state, without any element of a contract. There was no assurance or intimation that they were intended to be irrevocable, or that the laws in question should not be at all times subject to modification or repeal in like manner as other legislation. If a different intent had existed, it would doubtless, have been clearly manifested by the language employed. It would not have been left to encounter the possible results of such a struggle and conflict as have occurred in this litigation."

The leading case upon which counsel for plaintiffs in error rely is that of State of New Jersey v. Wilson, 7 Cranch, 164 3 Law ed. 303. In that case it appears that the remnant of the tribe of Delaware Indians previous to the year of 1758, had claims to a considerable portion of the lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles 2d, to the Duke of York. To accomplish this the government of New Jersey appointed commissioners to make a treaty with the Indians. An agreement was entered into whereby the Indians released their claim to all lands in New Jersey south of the river Rariton, and took other lands in lieu thereof. Effect was given to this agreement by an act of the legislature which provided,

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"that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in any wise notwithstanding." Thereafter, in 1804, the legislature of the state of New Jersey passed an act repealing the provisions of the act which exempted the lands from taxation. On the lands being taxed, suit was brought to restrain the same and the Supreme Court of the United States held that a valid enforcible contract had been entered into between the Indians and the government of New Jersey which was not subject to abrogation by any subsequent legislation. It occurs to us that there is a difference in the situation there presented from that in the case at bar. The Indians in that case traded lands which they owned or on which they had recognized claims, for other lands owned or purchased for them by the state government. This was virtually an exchange of one property which they possessed for other
67 property which they did not possess, and as was found in the case, every requisite to the formation of a contract was found in the proceeding. No claim was made or recognized that the government had power to compel this exchange or that it could have been made otherwise than by and through a mutual covenant. The state secured from the Indians that which it did not possess before, to-wit, the lands which they owned, and the Indians took in lieu thereof, that which the state owned, to-wit, certain other lands which was attached the exemption from taxation. The pleadings before us as we view them disclose a situation quite different. The title to the lands of the Five Civilized Tribes was held by them in fee with a reversionary interest in the government of the United States. The plenary power of the government to deal with the tribal affairs and property of these races is not an open question. Their government existed so long as Congress permitted them and when in the course of time it became obvious that statehood was approaching and could not longer be delayed, acts were passed looking to the division of the tribal property in severalty among the members. To accomplish this it was provided that a roll of the members should be made and that they should share equally in the tribal property. This involved necessarily a yielding on the part of each, when he took his separate portion of any claim on his part to the portions taken by the other members, they in the turn yielding any claim on his. Herein is involved the consideration which it is claimed was granted by the members of the tribes for the exemption from taxation contained in the allotment acts. The right or at least the power to deny consent to this program did not exist in the tribes and when it was yielded, naught was secured by Congress which it did not have prior thereto.

Speaking to this point, the Supreme Court of the United States in 1904, through Mr. Justice Brewer, in the case of Re Heff, 197 U. S. 488, 49 Law ed. 848, said:

68 "Of late years a new policy has found expression in the legislation of Congress,—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged

with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end.

And, in a case of this character, to secure immunity from taxation, it must be based on a contract and the existence thereof must be free from doubt, for, as was said in the case of West Wisconsin Ry. Co. v. Board of Supervisors, etc., supra:

"A reasonable doubt, as to whether an exemption claimed amounts to a contract, is fatal to the claim. Prima facie , every presumption is against it."

If in closing the affairs of the Five Civilized Tribes, Congress had the legal authority and power to have and made the provisions it did make without providing for the exemptions here claimed, then the granting thereof was a mere gratuity which could be revoked at its will; if the tribes or the members thereof yielding nothing which Congress did not already possess, then there is lacking the very essential element, consideration, to make of this statute a legislative contract. The existence of the former and absence of the latter condition we believe must be found, and if so, forecloses plaintiffs' claims. Oklahoma,—as did the state of Washington, referred to the case of Goudy v. Meath, 203 U. S. 146, 51 Law ed. 130, granted to Congress the power to determine how long this exemption from taxation should exist and when Congress released it, then it was released as to the state.

In the consideration of a law, all doubts are to be resolved in favor of its constitutionality. When it is attached if a doubt
69 exists it must be resolved in its favor. The act is a Federal statute, and has been held valid by the Federal Court sitting within the jurisdiction where these lands lie, and this conclusion is strongly persuasive with us. We do not and cannot sit in judgment on the policy of the law; our duty begins and ends with a determination of its validity—all other consideration must be addressed to the political, and legislative departments of the state and nation. And, as was said by Mr. Justice Swayne in the case of West Wisconsin Ry. Co. v. Board of Supervisors, etc., supra:

"We hold the conclusion we have announced to be the law of this case. With its ethics we have nothing to do. That subject is not open to our consideration."

Finding, therefore, as we do that the act is consitutional, the judgment of the trial court is sustained.

)OR COPY

Turner, C. J., Williams and Hayes, JJ., concur; Kane, J., dissents.

70 In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

In Equity.

BESSIE BROWN ENGLISH, Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County, Defendant in Error.

I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that the foregoing 69 pages, numbered from 1 to 69, both inclusive, are a full, true and complete transcript of all the pleadings, proceedings, and record entries in cause No. 1761, in which Bessie Brown English is plaintiff in error, and H. T. Richardson, County Treasurer of Tulsa County, is defendant in error, in the above Court, as fully as the same remain on file and of record in my office at the City of Oklahoma, State of Oklahoma.

And, I further certify that the original writ of error with the clerk's return thereto and the original citation with the acceptance of service thereon and a copy of the opinion of the Supreme Court filed in said cause (together with a copy of the opinion on which it is founded) are each hereto attached and herewith returned.

In witness whereof, I hereunto set my hand officially and affix the seal of the said Supreme Court at Oklahoma City, this 28" day of March, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 22,603. Oklahoma Supreme Court. Term No. 559. Bessie Brown English, plaintiff in error, vs. H. T. Richardson, county treasurer of Tulsa county. Filed April 5th, 1911. File No. 22,603.

22

Office Supreme Court, U. S.
FILED.
JAN 13 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

BESSIE BROWN ENGLISH,
Plaintiff in Error,
vs
H. T. RICHARDSON, COUNTY TREASURER OF TULSA COUNTY,
Defendant in Error
No. 559

MOTION TO ADVANCE

CHAS. WEST,
Attorney General of Oklahoma
Counsel For Defendant in Error

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

BESSIE BROWN ENGLISH,
Plaintiff in Error.

vs

H. T. RICHARDSON, COUNTY TREASURER OF TULSA COUNTY,
Defendant in Error

No. 559

MOTION TO ADVANCE

Comes now the defendant in Error and moves the Court to advance this cause for early argument and shows

First: That there is involved in this case the question of the meaning and constitutionality of the Act of Congress of May 27, 1908, entitled "An Act for the Removal of Restrictions from part of the Lands of Allottees of the Five Civilized Tribes, and for other Purposes," and whether said lands are subject to taxation in the State of Oklahoma; that on October 23rd, 1911, this Court advanced and set for argument at the same time as this case is to be argued the case of George W. Choate, et al., Plaintiffs in Error, vs. M. E. Trapp, Secretary of State Board of Equalization, et al., Defendants in Error, No. 809 of the October 1911, term, and the case of Michael H. Gleason, Minnie Love, Henry McGee, et al., Plaintiffs in Error, vs. J. I. Wood, Treasurer of Pittsburgh County, Oklahoma, et al., No. 575, of the October 1911, term: That the two latter cases involve the same questions as are involved in this case, except as to the application of said Act of Congress to lands of other Tribes of Indians.

Second: That in addition to the grounds

set out in the motion heretofore filed in Cases Nos. 575 and 809, the Defendant in error attaches hereto telegrams and letters from the County Treasurers of various counties of the State, showing approximately the number of acres of land and the amount of revenue involved in the three cases mentioned. That from said telegrams it appears that the number of acres of land as to which the question of its taxation is involved is more than 2,394,000 acres, and that the amount of taxes against said land which has been enjoined exceeds the sum of $1,675,200.

That said lands are distributed over twenty-two counties in the eastern part of the State of Oklahoma; being approximately one-fourth of the counties of said state and consist of the most valuable lands in said counties comprising a very large part of the taxable property upon which the said counties and the local municipalities must rely for support by taxation.

It is therefore requested that this case be advanced for early argument.

Chas West

.....

Attorney General of the State of Oklahoma.

EXHIBITS

3 CG UR 20 4 exa

Coalgate, Okla., Jan. 6, 1912 296

CHAS WEST, *Attorney General,*

Oklahoma City, Okla.

Approximately one hundred fifteen thousand acres current and back tax one hundred twenty-five thousand dollars.

625 pm PATSY GREENAN,

County Treasurer Coal County.

30—A. F. 27 Collect 4 exa 849

Ardmore, Okla., Jan. 6-12.

CHAS WEST, *Attorney General,*

Oklahoma City, Okla.

Approximately seventy-five thousand acres about sixty-five or seventy five thousand dollars involved including the years nineteen eight, nine and ten.

620 pm

D. M. RUMPH,
County Treasurer Carter County.

99 DA MN 25 Collect 2 Ex Poteau, Ok., 7-1912

CHAS WEST, *Attorney General,*

Oklahoma City, Okla.

Approximate number of acres in LeFlore County two thousand approximate amount of money forty thousand dollars approximated from nineteen hundred nine assessment.

243 PM

JNO. H. HINTON,
County Treasurer.

21, collect 2 extra blue 851
12. BN. GN. collect blue

McAlester, Okla., Jan. 8, 1912.

CHAS. WEST, *Attorney General,*

Oklahoma City, Okla.

Involved in injunction on Indian lands approximately three hundred fourteen thousand acres two million two hundred thousand dollars.

J. I. WOOD,

3:5 pm County Treasurer.

B-15-DA.SC. 16 collect 857

Tishomingo, Okla., Jan. 8th, 12.

CHAS. WEST, *Attorney General,*

Oklahoma City, Okla.

About sixty thouusand acres and about seventy-five or eighty thousand dollars for three years.

V. F. EUBANKS,

4:21p

B-12. DA.SC. 50 Blue 2 Extra 241

Duncan, Okla., Jan. 8th, 1912.

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

In answer to your day letter 6th the approximate number of acres involved in injunction against collection tax on Indian lands of this county is 122000 acres; money involved is about thirty one thousand for each of the past three years.

GABE FITZHUGH,

411p. County Treasurer.

W.N. GN. 28 2 extra 855

Wilburton, Okla., Jan. 8, 1912.

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

No. acres 23636 valuation $105,000 taxes due $4482.00.

JNO. C. EVANS,

4:15 pm. County Treasurer.

35.CY.SN. 12 Collect 853

Stigler, Okla., Jan. 8, 1912.

CHAS. WEST, *Attorney General,*

Oklahoma City, Okla.

Approximately sixty thousand acres taxes twenty thousand dollars for each year.

4:11-pm. W. W. ECKLES.

B-103. DA.SC. 31 Collect-BLUE 3 extra 854

Idabel, Okla., Jan. 8, 1912.

CHAS. WEST, *Attorney General,*

Oklahoma City, Okla.

Replying to your telegram will state that I am restrained on approximate one hundred seventy thousand acres worth upon an average six dollars fifty cents per acre.

E. L. NELSON,

Treasurer McCurtain County.

429 da hi—23 collect N L 2 extra 897

Marietta, Okla., Jan. 8th—12

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

There are approximately twenty-five thousand acres and twenty thousand dollars involved in the Indian injunction suit in Love County.

W. L. ALEXANDER.

County Treasurer.

2.O.CA. 39-2 Extra. 9

Purcell, Okla., Jan. 9th.

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

There is one hundred and seventy-five thousand six hundred seventy acres of land involved in tax suit in McClain County and taxes due on same is one hundred and sixty thousand two hundred and fifty dollars.

J. B. THURSTON,

820 am. County Treasurer.

94-Da-O. 26-collect 816

Ryan, Okla., Jan. 9, 1912.

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

Approximately eighty-five thousand acres twenty thousand taxes not paid for nineteen eleven about same for other years most of this involved in Indian suit.

J. E. HOWARD.

10 25 AM

177 Da. P. 56 Collect N. L., 2 ex

Hugo, Okla., Jan. 7, 1912.

CHAS WEST, *Attorney General*,

Oklahoma City, Okla.

There is approximately two hundred thousand acres in Choctaw Co. involved in the injunction against the collection of taxes on Indian lands for state, county, township and school purposes for the years 1909, 1910, and 1911. There is approximately one hundred thousand dollars involved.

9:10 pm

A. J. STEEN,
County Treasurer.

Antlers, Okla., Jan. 6, 1912

CHAS WEST, *Attorney General,*

Oklahoma City, Okla.

Dear Sir:

In answer to tel. of today. We have approximately 118309 acres covered by the Indian injunction having approximate valuation $500,000 valuation, involving about $10,000.00 in taxes.

Yours truly,

F. C. AMEND,

County Treasurer.

2 BU 79 Collect, Blue 4 ex

Ada, Okla., Jan. 8, 1912.

CHAS WEST, *Attorney General,*

Oklahoma City, Okla.

Number of acres of land in suit one hundred thousand to hundred and twenty-five thousand acres amount of tax involved in suit from ninety thousand to one hundred thousand dollars for the years 1909, 1910, 1911, divided as fol-

lows: 1909 tax, forty thousand dollars; 1910 tax twenty thousand dollars; 1911 tax, forty thousand. Yours respectfully,

RIT ERWIN,
County Treasurer Pontotoc County.

1021A

Pauls Valley, Okla., Jan. 6th, 1912.

CHAS WEST, *Attorney General,*
Oklahoma City, Okla.

Dear Sir:

In answer to a telegram received from you today in regard to the amount of money and number of acres of land now being held up on account of the parties being party to the tax suit. In answer to this will say that the number of acres will amount to something like seventy-four thousand (74,000) acres, and the amount of money

involved is about eighty-eight thousand seven hundred dollars ($88,700.00).

This statement is as near as I can get at it at present Yours very truly,

J. F. TRIMMER,
County Treasurer.
By L. Z. ASHURST,
Deputy.

b 7 OT 50 Collect BLUE 4 Ex Count dash.

Durant, Okla., Jan. 8th, 1912.

CHARLES WEST, *Attorney General,*
Oklahoma City, Okla.

400,000 acres taxable approximately 60 per cent in injunction suit 1909, 1910, 1911. Approximately $125,000 taxes tied up. This is a conservative estimate.

J. V. SPELL,
Treasurer of Bryan Co.

12 12P

7SP Mc 28, 2 Ex. 198

Sulphur, Okla., Jan. 8, 1912.

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

Amount involved in the inunction against assessment of Indian lands sixteen thousand eight hundred sixty nine dollars and forty eight thousand nine hundred thirty eight acres.

2:55 pm J. C. LINDSAY,

County Treasurer.

303 da tx 26 collect 2 extra 848

Madill, Okla., Jan. 8, 1912.

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

Marshall county approximate number of acres of Indian land one hundred fifty thousand approximate revenue on same one hundred twenty five thousand dollars.

V. GAYLE,

3:25 pm County Treasurer.

7 ND.GN 26 collect 849

Holdenville, Okla., Jan. 8, 1912.

CHAS. WEST, *Attorney General*,

Oklahoma City, Okla.

Approximate number of acres twenty to twenty-five hundred value $20,000 to $25,000.

341 pm. B. W. MACKEY.

NOTICE.

LEDBETTER, STUART & BELL,

Oklahoma City, Oklahoma.

HILL & MCCURTAIN,

McAlester, Oklahoma.

W. L. STURDEVANT,

St. Louis, Missouri.

You and each of you are hereby notified that on Monday, the 15th day of January, 1912, or as soon thereafter as the same may be heard, the defendant in error will present the above application to the court.

CHAS. WEST,
Attorney General.

Service of the above is accepted this ..... day of January, 1912, and consent is hereby given that it may be presented to the court at any time

.....

.....

Attorneys for Plaintiff in Error.

Library Supreme Court, U. S.
FEB 13 1912
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 559.

BESSIE BROWN ENGLISH,
Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County,
Defendant in Error.

ERROR TO THE SUPREME COURT OF OKLAHOMA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error, Bessie Brown English, is a citizen of the Creek Tribe of Indians, which is one of the Five Civilized Tribes. Under Allotment Acts of March 1st, 1901 (31 Stat. 861) as amended by the supplemental Act of June 30, 1902, (32 Stat. 500), commonly referred to respectively as the Original and Supplemental Creek Agreements, she received an allotment of the Creek Tribal Lands, consisting of 160 acres, 40 acres of which she selected as her homestead, receiving a separate deed for the said homestead, bearing date January 15, 1904, containing

a covenant in accordance with the provisions of said agreements that the said lands shall be non-taxable and inalienable and free from any incumbrances whatever for 21 years (Trans. p 18). The said homestead is located in Tulsa County, State of Oklahoma.

On the 28th of September, 1909, while plaintiff in error still owned and occupied said homestead the officers of Tulsa County, Oklahoma, charged with such duties under the State law, levied and assessed a tax for state and county purposes upon said homestead and threatened to advertise and sell same to satisfy said tax levy.

On November 19, 1909, plaintiff in error commenced an action in the district court of Tulsa County, Oklahoma, against defendant in error, H. T. Richardson, Treasurer of Tulsa County, Oklahoma, to enjoin the sale of said homestead for taxes so levied, and to clear the title thereof from the cloud of the levy and the assessment made thereon, by her petition filed on that day (Trans. pp 11 to 19). The main grounds relied on by plaintiff in error for the injunction sought were, that under the said agreements and acts of Congress ratifying same, her homestead is exempt from taxation for a period of 21 years from the date of her deed, that said agreements and acts of Congress were binding upon the State of Oklahoma and that her rights thereunder could not be violated and her exemption privileges destroyed without compensation and that neither the legislature of the State of Oklahoma nor the National Congress had power to deprive her of such rights, etc., etc.

A general demurrer was filed to the petition by M. A. Breckinridge, County Attorney and Attorney for defendant in error (Trans. p. 21).

Subsequently and after argument the court entered

an order sustaining the said demurrer and rendering judgment against plaintiff for costs (Trans. p. 21). From the judgment of the court sustaining the demurrer, plaintiff in due course perfected her appeal to the Supreme Court of Oklahoma.

Thereafter the judgment of the lower court was affirmed by the said Supreme Court (Trans. p 30) on the authority of Gleason vs. Wood, County Treasurer, a case involving a kindred question which was heard in the Oklahoma Supreme Court with the above case (Trans. pp 32 to 42).

To review the decision of the Supreme Court of Oklahoma, sustaining the ruling of the lower court in this case, this writ is prosecuted.

As seen above in both the original and supplemental Creek Agreements, Acts of Congress of March 1, 1901 (31 Stat. 861) and of June 30, 1902 (32 Stat. 500), respectively, covenants were entered into between the representatives of the government and the representatives of the Indians to the effect that the homestead of the Indian should be exempt from taxation for a period of 21 years, and that long after the allotment had been made and deeds executed, to-wit: in September, 1909, a tax was levied against the homestead here involved for State and County purposes. And it will be seen later that the State of Oklahoma in her constitution, adopted in the year 1907, long after the allotment, bound the State to respect the rights of Indians existing under agreements and Acts of Congress. However, on May 27, 1908 (35 Stat. 312), Congress enacted a law removing restrictions against alienation from a large class of Indian lands including that class to which the homestead in controversy belongs, plaintiff in error being a mixed blood Indian of less than one half Indian

blood, all of which appears in Section 1 of the later Act. It will be observed that that section deals only with the removal of restrictions against alienation. But Section 4 of the latter Act provides:

> "That all land from which restrictions **have been** or **shall be** removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

It is wholly upon the authority, or supposed authority, of this latter provision that the State of Oklahoma is attempting to extend her general revenue laws over, and to include as subjects of taxation, the homestead of this class of Indians.

The issues of law presented in this writ of error, briefly stated, are:

First. Is an exemption of property from taxation under the circumstances shown in this record a property right?

Second. Is a mutual covenant for an agreement between the government and the Indian tribes, made for the benefit of the tribe and ratified by an Act of Congress, guaranteeing to them a substantial property right, inviolate? Or, stated differently, can the government by a subsequent Act of Congress, after the agreement containing such covenant has been fully executed by both parties, authorize a violation and extinguishment of the property rights without the consent of the beneficiary thereof or without due process of law?

Third. Was said Section 4 of Act of May 27th, 1908, above, intended by Congress to apply to land allotted and patented containing an express covenant of exemption as in this case?

Fourth. Has Congress the power to enact a law

depriving a person of a property right without due process of law?

Fifth. Will not the said Section 4 be construed to apply only to lands of the Five Tribes from which restrictions are removed where no agreements or vested rights will be disturbed (there being a large amount of such lands) and will not that class of homesteads of which the one in controversy is a part be excepted from the general application of the statute and the statute thereby be permitted to operate only as to the lands not so involved.

Sixth. Conceding the power of Congress to repeal any treaty, or any Act which it may pass, can it in so doing impair property rights acquired thereunder?

It would serve no good purpose to recount in detail here the history of the relation of the Government of the United States to the various Indian tribes, found within its borders on the adoption of the Constitution, nor to trace in detail the many modifications of the policy of the Government in its dealings with the Indians and with Indian affairs as such modifications have from time to time taken place. But it will be sufficient for our purpose to refer only briefly to certain facts which we deem important to be considered in determining the issue presented.

From the time of the treaties and legislation under which the Creek Nation became possessed of their lands in the Indian Territory, received in exchange for lands then owned by them east of the Mississippi river, until the time of the agreements and legislation under which their lands were allotted to the members of the tribe in severalty, the Tribe held

the land by a title that could only be defeated on abandonment of the property, or ceasing to exist as a tribe. This status was given to their title by the Act of Congress of May 28th, 1830, and the patent issued to the Tribe on August 11th, 1852, executed in pursuance of said Act of Congress. The burden assumed by the Government when this land was acquired by the Tribe, was to defend the Tribe in its use and occupancy of same, and to prevent its alienation, and during all the time of its occupancy of these lands, and for a long time prior thereto, the Government assumed a relation to this and the other Indian tribes resembling that of a guardian to his ward, and in that capacity exercised an authority over the Indian sufficient, in its wisdom, to protect both their personal and property interests.

When the new and recent policy of the Government looking to the allotment of the lands in severalty, was adopted, it was necessary for the old order of dealing with the Indian to pass out, as the Government could no longer protect him through the protection theretofore rendered his Tribe; nor could his property interests, theretofore protected as an interest in the tribal estate, be guarded in the old way. Compatible, therefore, with the theory of individual ownership in allotments, the Government sought to protect the allottee in the use and enjoyment of his individual estate received on the division and allotment of the lands by means of restrictions upon alienation, exemptions from taxation, etc., etc., classified as to Indians and lands as deemed best for the Indian's welfare.

The reluctance of the Indian to break up tribal relations and to have the tribal estate divided, is familiar knowledge to all. Without pressure on

the part of the Government, such a condition would probably not have become established for perhaps several generations to come. This frame of mind of the Indian was recognized by the Government to exist and the considerations of good faith with him made it obligatory that everything possible should be done to reconcile him to the change in conditions and to re-assure him of its continued interest in his welfare and the safety of his property rights under the new order. This was all accomplished, in so far as accomplished at all, as suggested above, by placing restrictions upon his lands, providing for exemptions from taxation of portions of same, and a guarantee of the fulfillment of the provisions and covenants of agreements entered into. Along with the change in other matters came citizenship with all the rights and immunities thereof, including the capacity to own property individually, in fee simple title, not subject to defeasance for any cause or by any authority.

After long deliberation, the representatives of the United States Government and the Creek Nation of Indians, as alleged in the petition herein, did, on the 8th day of March, 1900, conclude an agreement which was the first co-operative progress of the Creek Tribe and the Government in breaking up the old order. This agreement provided for the allotment of the lands in severalty, for townsite segregations, the acreage and value of an allotment, homesteads, restrictions, exemptions, etc. One among the first provisions of that agreement is that relative to the exemption of homesteads from taxation, one that we are concerned with here, found in Section 7 of that agreement. It reads as follows:

> "Each citizen shall select from his allotment forty acres of land as a homestead, which shall

be non-taxable and inalienable, and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above, etc., etc." (31 Stat. 861.)

By Act of Congress, approved March 1st, 1901, this agreement was enacted into law and duly ratified by the Creek National Council, and became a law on proclamation by the President, May 25th, 1901. Under the agreement and Act, this valuable right was to be evidenced by a covenant in a separate deed, conveying the homestead.

Nor was the same important consideration overlooked in the subsequent agreement between the representatives of the same parties; but on the contrary, in the agreement known as the Supplemental Creek Agreement, subsequently made and enacted into law, and approved June 30th, 1902, and duly ratified and proclaimed, the provision, with an amendment enlarging its operation and effect, was re-enacted as found in Section 16 of said Supplemental Agreement in the following words:

"Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be, and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear." (32 Stat. 500).

And Section 21 of the said Supplemental Agreement contains an additional provision, as follows:

"This agreement shall be binding upon the United States and the Creek Nation, and upon persons affected thereby, when it shall have been ratified by Congress and the Creek National

> Council, and the fact of such ratification shall have proclaimed as hereinafter provided."

The ratification provided for was had by the Creek National Council July 26th, 1902, and the proclamation of the President issued August 8th, 1902.

One feature in which the two agreements differ is clear and significant. In the original agreement the twenty-one years of exemption began to run on May 25th, 1901, the day the agreement and law became operative. But by the terms of the Supplemental Agreement, the exemption period began only from the date of the deed, an advantage in favor of the Indian, ranging from one to four years. And the repetition in Section 16, that the covenant for exemption should be contained in the separate deed to the homestead, was a renewed guarantee to the Indian. This emphasizes the importance attached to the exemption by the contracting parties. And the provision in Section 21, above, that the agreement should be binding on all the parties again, invites confidence. All this makes the moral obligation of its *bona fide* observance only the more sacred.

The deed conveying the homestead to the members of the Creek tribe, including this plaintiff, were made in pursuance of the provisions set out above and contain the following covenant:

> "Said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years." (Trans. p 18).

Deeds to the allotment were accepted by the allottee of the tribe generally, and the deed to the plaintiff in this case was accepted by her on the 5th day of January, 1904, and recorded in the proper office.

We now call attention to one provision of Section 22 of the said Creek agreement of March 8th, 1900, and the Act of Congress of March 1st, 1901, relative to the force and effect of the acceptance of a deed by an allottee, and of the rights and interests surrendered in consideration thereof, which reads as follows:

> "Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.
>
> All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed." (31 Stat. 861).

It will be seen from the foregoing that it was the purpose of the representatives of the Government and of the Indian tribe to so adjust the affairs of the respective parties that the individual allottee would receive an absolute fee simple title to his allotment, freed entirely from any claim or interest of the Government and the tribe, and that the Indian should relinquish all interest in the Tribal estate allotted. Under this arrangement, no contingency could arise which would vest any interest or claim or right to the allotments in the Government of the United States, nor could the allottee ever assert any claim against the Government, by reason of any interest which prior to that time he had enjoyed as a member of his tribe in the lands allotted under the agreement.

So it must be seen from this legislation that upon the acceptance of the allotment, the agreements entered into between the tribe and the Government, made in the interest of the individual members of

the tribe, become fully executed and performed, and all the rights fixed by the agreement became absolute.

Long after the acceptance of her allotment by plaintiff, the Congress passed an Act, commonly known as the "Enabling Act," under which Oklahoma was admitted into the Union as a State. This Act, or the last amendment thereto, was approved March 4th, 1907. (34 Stat. 267). Under the Enabling Act, the people of Oklahoma were given authority to adopt a constitution in conformity to the provisions and requirements thereof, and in pursuance of such authority, did, on November 16th, 1907, by a vote of all the people, adopt a constitution, in accordance with said "Enabling Act." Among the various provisions of that instrument, we call attention to Section 270 thereof, recognizing the existence of certain treaty rights of the Indians in Oklahoma, and acknowledging the force and validity of same. This Section reads as follows:

> "All property owned by———, etc., shall be exempt from taxation, and such property as may be exempt by reason of the treaty stipulations existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws." (Trans. p 15).

The people of Oklahoma, when casting their votes adopting the above section, had in mind the exemption from taxation of the lands of the Creek, Choctaw and other Indian tribes, as had theretofore been provided for in the agreements made between the Government and such tribes, and of course, have estopped themselves to assert any interest to the contrary.

In view of the foregoing legislation and this pro-

vision of the Constitution of Oklahoma, it is quite probable that no attempt would have been made by the taxing authorities of Oklahoma to assess these homesteads had it not been for the color of authority therefor, found in the Act of Congress approved May 27th, 1908, entitled "An Act for the Removal of Restrictions from Part of the Lands of Allottees of the Five Civilized Tribes, and for other purposes."

Section 1 of this Act contains, among other things the following provision:

> "That from and after sixty days from the date of this Act, the status of the land allotted heretofore, or hereafter to allottees of the five civilized tribes, shall, as regards restrictions on alienation or incumbrance, be as follows:
>
> "All lands, including homesteads of said allottees, enrolled as intermarried whites, as freedmen and as mixed blood Indians, having less than half Indian blood, including minors, shall be free from all restrictions." (35 Stat. 312).

And Section 4 of the same Act of Congress, among other things, contains the following provision:

> "That all lands from which restrictions have been, or shall be removed, shall be subject to taxation, and all other civil burdens, as though it were the property of other persons than allottees of the five civilized tribes."

The above are the important legislative facts.

Omitting formal parts, the petition in this case is as follows:

"1. Plaintiff states that she is now and during her entire life has been a member and citizen of the Creek or Muskogee Tribe of Indians, which is one of

the Five Civilized Tribes, and is an inhabitant and resident of the County of Tulsa, in the State of Oklahoma, and is a citizen of the United States and the said State of Oklahoma; that on the 27th day of October, 1899, she was duly enrolled as a member of the said Creek Tribe by the proper authorities in charge of such enrollment and that her name now appears upon the record thereof on file in the office of the Commission to the Five Civilized Tribes, her enrollment number being 2960; and that as such citizen of said Tribe she was at all times hereinafter mentioned, and is now entitled to all the property, rights, privileges and benefits arising therefrom and had an interest in all the communal property of the said Tribe of Indians of every kind and description incident to and arising from such membership and citizenship therein; that prior to the allotment of the land and property of the Tribe in severalty to the various citizens thereof as hereinafter stated, each citizen, including this plaintiff, had and possessed an equal, undivided communal interest therein with every other citizen, and at no time and in no manner did this plaintiff ever forfeit or relinquish any of said rights prior to the time of receiving the allotment of lands as hereinbelow stated.

2. Plaintiff further states that by virtue of an Act of Congress, approved May 28th, 1830, and a patent issued to the Creek Tribe of Indians in pursuance thereof, bearing date, August 11th, 1852, the said Tribe became the owner in fee simple of all that tract of land in the said Act of Congress and the said patent described located in the then unsettled Indian Territory, now comprising all of eight, and the minor portion of another, of the large counties of the present State of Oklahoma; that under the provisions of the said Act of Congress and the treaties between the Government, and said Tribe upon which said Act was based, the Government, in recognition of its obligation to an inferior and dependent race with which it had concluded negotiations for the exchange of lands agreed and undertook

to protect the said Tribe in its undisturbed ownership and occupancy of the lands so conveyed to it as its new home and future abiding place; that the obligation so assumed by the Government contemplated the preservation of such lands for the exclusive use and benefit of the Tribe, all the members thereof and their descendants, and to protect the Indian against his own improvidence and to secure him a fixed home, all as expressed in said Act and the patent made in pursuance thereof; that said lands and all parts thereof were made inalienable and were never subject to conveyance, incumbrance, liens, judgments or charges of any character whatever and in that condition so remained under the said guarantee and protection of the United States until modified by an agreement between the United States and said Tribe as hereinafter set forth.

3. Plaintiff further states that, yielding to urgent and repeated requests on the part of the Government and the persistent importunities of white settlers who had already become numerous, and were daily becoming more numerous, among the Indian population, the Tribe consented to enter into negotiations with the Government, having for their purpose the partition of all Tribal lands and property and the distribution of same among the individual members of the Tribe in severalty.

4. Plaintiff further states that thereupon, to-wit: on the 8th day of March, 1900, having in view such negotiations, the Commission to the Five Civilized Tribes representing the Government, met in convention at the City of Washington with the duly constituted representatives of the Creek Nation of Indians. consisting of Pleasant Porter, Principal Chief, George A. Alexander, David M. Hodge, Isparhecher, Albert P. McKellop and Cub McIntosh to negotiate an agreement between the United States of America upon one part and the Creek Tribe of Indians upon the other part, as the contracting parties having as its purpose the partition of the tribal property of the said Creek Nation and the allotment

of same as aforesaid, and that on the said date when the said convention assembled the said Creek Tribe of Indians was the owner in fee simple of all the lands above mentioned in the said patent conveyed, subject to the condition aforesaid.

5. Plaintiff further states that having in view the long standing obligation of the Government to the Tribe, as so expressed in said Act of Congress and patent and arising from the guardianship which the Government exercised over the Indian and his affairs, and recognizing that the welfare of the Indian in the unequal race with the white man, which he was about to enter, demanded a continued protection in the undisturbed use and enjoyment, for a limited time, of a small portion of the property which would fall to him as an allotment and as an inducement and consideration to the Indian to accept his portion of the tribal property in severalty and relinquish his interest in the tribal property allotted and to be allotted, it was provided by the said convention that each citizen should receive a fixed portion of said lands from which he should select the amount of 40 acres thereof as a homestead, and that such homestead should be inalienable and nontaxable for a perior of 21 years from the date of such allotment; that the second clause of section 7 of the said Creek Agreement relative to such homestead contains the following provision:

> "Each citizen shall select from his allotment, forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above," etc.

that said Agreement was enacted into law by Act of Congress approved March 1, 1900, and duly ratified by the Creek Nation as provided for therein.

6. Plaintiff further states that prior to the time that any allotments were made as provided in the aforesaid Agreement and Act of Congress, another con-

vention was held between the United States of America and the said Creek Tribe of Indians, composed of the Commission to the Five Civilized Tribes representing the Government of the United States on the one part and Pleasant Porter, Principal Chief Roley McIntosh, Thomas W. Perryman, Amos McIntosh and David M. Hodge, a commission duly appointed to represent the Creek Nation on the other part, as the contracting parties, which entered into a Supplemental and final agreement which was enacted into law by Act of Congress approved June 30th, 1902, and duly ratified by the Creek Tribal Council, July 6th, 1902, such ratification having been duly proclaimed by the President, August 8th, 1902, all as contemplated therein, which Supplemental Agreement, upon the consideration aforesaid, contains, among other things, the following provisions and covenants:

> "Sec. 16. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."
>
> "Sec. 21. This agreement shall be binding upon the United States and the Creek Nation, and upon all persons affected thereby when it shall have been ratified by Congress and the Creek National Council, and the fact of such ratification shall have been proclaimed as hereinafter provided."

7. Plaintiff further states that, in pursuance of the said Agreements, the Act of Congress ratifying same and the proclamation as aforesaid, this plaintiff, in conformity with all the laws, regulations and rules prescribed in reference thereto, duly made selection of an allotment as provided by said Agreement of 160 acres of the communal lands of said Tribe; and

that thereafter on the 12th day of December, 1902, a separate deed was executed to her as provided in the said Agreement for the homestead so selected by her from her said allotment; that the homestead so selected is the northeast quarter of the southeast quarter of Section twenty-two (22) Township Eighteen (18) North, Range Twelve (12) East, containing 40 acres lying and situated in the County of Tulsa and State of Oklahoma; and that the deed issued to her and signed by the Principal Chief of the Creek Nation and the Secretary of the Interior as provided by said Agreement also contains, as required thereby, the stipulation and covenant that the said homestead shall be non-taxable, inalienable and free from any incumbrance whatever for 21 years from the date of the said deed, the said covenant so contained in said deed being as follows:

> "Said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years;"

that said deed was duly delivered to this plaintiff and accepted by her on the 5th day of January, 1904, and is duly recorded in the office of the Commission to the Five Civilized Tribes in Book "F," at page 375, and that ever since said deed was executed this plaintiff has continued to own in fee simple and occupy and does now own and occupy the lands above described as her homestead; and that a copy of said deed is filed herewith and made a part hereof and marked Exhibit "A."

8. Plaintiff further states that by reason of the said Agreements entered into between the United States of America and the Creek Tribe of Indians as aforesaid, and the execution and delivery to her of the deed of conveyance to the homestead aforesaid containing the condition and covenant that the said homestead should be exempt from taxation for a period of 21 years as provided in said Agreements and Acts of Congress, plaintiff has acquired a vested property right and interest in the said exemption

which is inviolable and that the same is an exemption, immunity privilege, grant, franchise and right of great value; that upon the acceptance of the deed to her allotment as aforesaid, plaintiff alleges that the agreement and contract entered into as aforesaid between the Government and said Tribe has been and become fully performed and executed; and that by the terms of said agreements, on the execution and acceptance of said deed, both the Government and the said Tribe relinquished all right, title and interest in and to said allotment, and this plaintiff relinquished all her right, title and interest in and to the said tribal property, allotted and to be allotted under said Agreements; that the tribal interest so relinquished by plaintiff was relinquished upon the consideration of the express covenants in said agreements, to-wit:—that plaintiff should have the fee simple title in her said allotment free of any and all right, title and interest of the United States and said Tribe therein and also have the said homestead exempt from taxation for the said period of twenty-one years, and that the said covenants should be binding upon the United States, the Creek Nation and all persons affected thereby; that by reason in part of the guarantee by the Government, of the perpetual use and occupancy of said lands to the Tribe, her interest in the said lands and properties, as such member and citizen of said Tribe as aforesaid, was of great pecuniary value and that such property interest was daily becoming more and more valuable by reason, not only of the constant increase in the value of the land and the accumulation of the surplus fund of said Tribe, but because of the constantly diminishing number of persons who could participate and share therein.

9. Plaintiff further alleges that the people of Oklahoma, in pursuance of an Act of Congress approved June 16, 1906, as amended by Act of Congress approved March 4th, 1907, commonly called the Enabling Act, duly adopted as provided therein a Constitution for the proposed State of Oklahoma which

constitution, under proclamation of the President of the United States bearing date of November 16th, 1907, was declared to be in conformity with the Enabling Act and then and therefrom became of binding force and a fundamental law of the said State of Oklahoma; that Section 270 of the said Constitution adopted and proclaimed as aforesaid contains, among other things, the following provisions:

> "All property owned by————————etc., shall be exempt from taxation, and such property as may be exempt by reason of the treaty stipulations existing between the Indians and the United States Government or by Federal laws, during the force and effect of such treaties or Federal laws."

10. That the said constitution was adopted by the people of Oklahoma, proclaimed and became a law long after the making of the agreements and the passage and approval of the law aforesaid, under which the restrictions and exemption from taxation were guaranteed to this plaintiff and others of her degree of blood, etc., as hereinbefore alleged and that the said laws and agreements imposing restrictions covenanting and granting exemption from taxation as aforesaid were subsisting and valid laws and fully executed agreements at the time the said constitution was adopted. That because of such laws and agreements and the said provision of the constitution of Oklahoma, the allotment of this plaintiff is exempt from taxation and not subject to levies, charges, assessments and taxes under any laws of the State of Oklahoma or of the United States.

11. Plaintiff further states that, notwithstanding the foregoing covenant and agreements, an Act of Congress, approved May 27, 1908, entitled, "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes," was passed, without the consent or approval of said Tribe or this plaintiff, which provided in Section 1 thereof, among other things, as follows:

> "That from and after sixty days from the date of this Act the status of the lands allotted heretofore, or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions;"

and it is further provided among other things, in Section 4 of said Act as follows:

> "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes;"

and plaintiff states that she is a Muskogee (Creek) Indian and of less than one-half Indian blood, and among the number of those from whose homesteads restrictions were removed by the above provision of said Section 1. But the plaintiff states and avers that said Act of Congress, and more particularly the said provision of Section 4 thereof, in so far as the same attempts to deprive this plaintiff of the exemption right, privilege, franchise, grant and immunity guaranteed and covenanted to her in the said Agreements, Acts of Congress and deed aforesaid, would impair the obligation of the said contract and agreement and is, therefore, unconstitutional and void being in violation of and repugnant to Section 10 of Article 1 of the Constitution of the United States; and is further unconstitutional and void for the reason that it would deprive this plaintiff of her property, interest and property right in violation of the fifth and fourteenth Amendments to the Constitution of the United Statets, which provide that no person shall be deprived of life, liberty or property without due process of law.

12. Plaintiff further states that the defendant,

H. T. Richardson, is the duly elected, qualified and acting Treasurer of the County of Tulsa, in the State of Oklahoma; that one C. F. Rogers is the County Clerk of said Tulsa County, and that heretofore, to-wit: on the 16th day of July, 1909, the regularly constituted officers charged with such duties in regard to taxable property in the said County of Tulsa, assessed and levied a tax for State and County purposes upon the said homestead of this plaintiff in the amount and sum of $14.19, and that said tax is now an incumbrance, charge, and cloud upon the title of same, and that the said County Clerk listed the said homestead upon the tax list and roll of the said County and over his warrant placed said list in the hands of of the said defendant, the Treasurer of the County aforesaid, for collection and enforcement against the said homestead of this plaintiff; that the defendant, said County Treasurer, is now threatening and attempting to collect the said tax and is threatening and attempting and about to involve this plaintiff in additional large expense by way of penalties for delinquency on her refusal to pay the same and is attempting and threatening and about to institute proceedings to collect the said tax and is threatening and about to advertise and sell, and unless enjoined will advertise and sell, the said property at public auction to satisfy the lien thereof, all to the very great damage, and irreparable injury of this plaintiff, and in violation of her rights under the exemption aforesaid. And plaintiff further states and avers that the acts and conduct of the said defendant as aforesaid are without authority of law, illegal and void and that her said homestead is exempt from taxation and not subject to pay the taxes so assessed and levied upon and against it under any law of the State of Oklahoma or of the United States; that any law of the said State or of the United States authorizing or attempting to authorize the taxation of the said homestead is in violation of the said exemption rights of this plaintiff under the Agreements and Acts of Congress afore-

said and in conflict with the said Section 10 of Article 1, and said Amendments 5 and 14 of the Constitution of the United States, and, therefore, void, and of no force and effect adverse to such rights."

The prayer is for an injunction to restrain the wrongs complained of and for general relief.

The defendant, through County Attorney, M. A. Breckenridge, filed a demurrer which, omitting formal parts, is as follows:

"Comes now the defendant in the above styled and entitled cause and demurs to the petition of the plaintiff upon the grounds that the same does not state facts sufficient to constitute a case of action against the defendant."

After argument of counsel, and due consideration by the Court, the said demurrer was sustained, and the plaintiff, declining to plead further and electing to stand upon her petition, judgment was rendered by the Court dismissing the petition with costs against the plaintiff.

From such decision and judgment of the Court, plaintiff prosecuted her petition in error.

Because of the singleness of the issue presented, the discussion might in compliance with the rule be arranged under one topic. We will, however, discuss different phases of the question under separate head-notes, with a view of presenting more clearly than otherwise the position for which we contend, and the principles which we consider controlling. We shall endeavor to show:

First: That an exemption from taxation is a

property interest and a vested right and that a contract for an exemption is protected by the Constitution, like other contracts.

Second: That upon principle and authority, Congress is as much prohibited, under ordinary circumstances, from passing laws impairing the obligation of contracts as the legislatures of the States.

Third: That a treaty or an agreement of the Government made with an Indian Tribe has the legal force of a treaty with a foreign State, and that because of the situation of the parties, it stands upon higher moral grounds.

Fourth: That a repeal of the agreements made with the Indian and embodied in Acts of Congress under which this exemption right is claimed will not be presumed, but if repealed, rights already acquired are not affected.

Fifth: That the principles of law under which we seek to protect the exemption in this case have been invoked by the courts to protect similiar rights in an almost endless variety of cases.

Sixth: That the fifth amendment to the Constitution is a direct limitation upon the power of Congress to deprive a person of property without due process of law, and that an exemption from taxation is property within the meaning of that amendment.

Seventh: That the State of Oklahoma is estopped by her organic law to assert an interest against the right of an Indian under a valid agreement or treaty.

ASSIGNMENT OF ERROR.

First: The Supreme Court erred in deciding that Section 16 of an Act of Congress, approved June 30, 1902, (32 Stat. 500) entitled, "An Act to ratify and confirm a Supplemental Agreement with the Creek Tribe of Indians and other purposes," does not vest in plaintiff in error a valuable property right, to-wit: the exemption of her homestead from taxation for a period of 21 years from the date of her deed therefor, to-wit: Dec. 12, 1902.

Second: The said Supreme Court erred in deciding that the exemption guaranteed to her by the said Section 16 of the said Act does not constitute a contract resting upon a valuable consideration which cannot be imparied or violated by any subsequent Act of Legislation, either on the part of Congress or the State of Oklahoma.

Third: The last sentence of Section 16 of the Act of June 30, 1902, provides as follows: "Each Citizen shall select from his allotment 40 acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable and free from any incumbrance for 21 years from the date of the deed therefor and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear." The Supreme Court erred in deciding that the grant of an exemption from taxation contained in said clause and the stipulation in the deed of plaintiff in error to her homestead, to the effect that it should be free from taxation for a period of 21 years, as required by said clause, does not vest in her an

absolute and unconditional property right and constitute a grant and contract in her favor which is protected by Section 10 of Article 1 of the Constitution of the United States, and which is likewise protected by amendments 5 and 14 of the Constitution.

Fourth: The Supreme Court erred in deciding that the said exemption was a mere gratuity and rested upon no consideration and was subject to be withdrawn at any time by the legislative authority so that, notwithstanding she is a citizen of the United States and owns her homestead in fee simple title and that such exemption adds great value to her estate, that, nevertheless, such property right may be extinguished by an Act of legislation and herself thereby deprived of the value thereof without compensation.

Fifth: The demurrer filed to the petition of plaintiff in error in the lower Court conceded, under the "Practice Act" of Oklahoma, that the exemption of plaintiff in error was a property right of great value and that it rested upon a valuable consideration passing from her, and that the property interest exchanged by her for the allotment received was greatly in excess of the value of said allotment and it was admitted by said demurrer that the exemption right and privilege granted to her in said Section 16, was one of the inducements and considerations which influenced her to accept the allotment and relinquish her interest in the Tribal estate and to also co-operate with the Government in its policy of alloting the lands of her Tribe in severalty to the members thereof.

Sixth: The said Supreme Court erred in failing to decide that Section 16 in connection with Section 21 of the said Act of June 30, 1902, (32 Stat. 500) constituted a covenant between plaintiff in error and the Government of the United States, which cannot be

broken (the conditions all being complied with) without the exercise of bad faith toward her, a member of a dependent and confiding race.

Seventh: The said Supreme Court erred in deciding that the first clause of Section 4 of an Act of Congress, approved May 27, 1908, (35 Stat. 312) was intended by Congress to subject the lands in controversy herein to taxation; and erred in failing to decide that the land in controversy and the class of lands to which it belongs should be excepted from the operation of the statute; and erred in failing to decide that the application of the statute should be limited to lands on which the statute could operate without affecting the class of land in controversy, and the vested rights of the owners thereof.

Eighth: The said Supreme Court erred in deciding that the said Section 4 of the Act of May 27th, 1908, if intended to apply to the class of lands in controversy, was a valid exercise of the power of the legislature.

Ninth: The said Supreme Court erred in deciding that the said Section 4 of the said Act was intended to apply to the homestead of plaintiff in error and lands of that class, and in deciding that the said Act in that regard is constitutional; and erred in deciding that the said Section 4 is a valid law, and that the said homestead of plaintiff in error is subject to taxation by virtue thereof.

Tenth: The said Supreme Court erred in denying to plaintiff in error the rights, privileges and immunities granted to her by said Section 16 of the said Act of Congress of June 30, 1902, (32 Stat. 500) against her contention and that said rights should be protected; and erred in sustaining the decision of the

trial court in which the demurrer to her petition was sustained and a judgment rendered against her, depriving her of the rights, privileges and immunities claimed, and adjudged her to pay the cost of the action, and further erred in not reversing the said trial court and deciding the issue in favor of the plaintiff in error.

Eleventh: The said Supreme Court erred in adjudging that the issues presented in this cause are identical in all respects with those of the said above mentioned case of Gleason vs. Wood, except that the same are applicable to the allottees of the Creek Tribe of Indians; and erred in deciding this case against the plaintiff in error upon the grounds stated in said opinion.

ARGUMENT.

I.

A legislative grant of an exemption from taxation is presumed to rest upon a consideration and is conclusive against the grantor; and the exemption attaching to the property, right or franchise becomes an element of its value and is, therefore, a property right; and, when this right becomes vested it is inviolate and cannot be extinguished or disturbed by legislation. Such a grant constitutes a contract which is protected by Section 10 of Article 1 of the Constitution of the United States, and likewise by amendments Five and Fourteen of the Constitution. And, where an agreement for an exemption is entered into between the State and an individual and the contract becomes executed, such a contract has all the force of a grant, and the authority of the grantor thereover entirely ceases.

New Jersey v. Wilson, 7 Cranch, 164;
Thompson v. Holten, 23 Fed. Cas. No. 13, 958;
Poindexter v. Greehow, 114 U. S., 270;
Fletcher v. Peck, 6 Cranch, 87;
Cooley's Const. Limitations, 7 Ed. page 395;
3rd Parsons on Contracts, 9th Ed., page 353.

We desire at the outset to direct the attention of the Court to a very early case decided by the Supreme Court of the United States, in which the identical question presented by this appeal was considered and determined. As the principles announced in this case have many times since received the sanction of the same Court, as well as many of

the Supreme Courts of the States, we feel warranted in submitting the full text of the opinion.

The validity of a contract between the State of New Jersey and an Indian tribe, in which it was covenanted that the lands of the Tribe should be exempt from taxation was the issue presented. This was the first case ever presented to the Supreme Court of the United States, in which that Court was called upon to determine whether or not an agreement for an exemption of property from taxation was a contract protected by Section 10 of Article 1 of the Constitution. The conclusion reached by the Court was that such a contract is protected, and that the rights under such a contract are inviolate, and that the property right of an exemption from taxation is one that cannot be disturbed by subsequent legislation. The opinion was rendered by Chief Justice Marshall and the principles announced have never since been questioned, but have been invoked in numerous instances to protect rights under similar contracts and grants made by individuals, municipalities and States.

The opinion is as follows:

> "This is a writ of error to a judgment rendered in the court of last resort in the State of New Jersey, by which the plaintiffs allege they are deprived of a right secured to them by the Constitution of the United States.
>
> The case appears to be this:
>
> "The remnant of the tribe of Delaware Indians previous to the 20th February, 1758, had claims to a considerable portion of lands in New Jersey to extinguish which became an object of the government and proprietors under the conveyance from King Charles II, to the Duke of York. For this purpose a convention was held in February, 1758, between the Indians and commis-

sioners appointed by the government of New Jersey; at which the Indians agreed to specify particularly the lands which they claimed; release their claim to all others; and to appoint certain chiefs to treat with commisioners on the part of the government for the final extinguishment of their whole claim.

On the 9th of August, 1758, the Indian deputies met the commissioners and delivered to them a proposition reduced to writing—the basis of which was, that the government should purchase a tract of land on which they might reside—in consideration of which they would release their claim to all other lands in New Jersey south of the river Rariton.

This proposition appears to have been assented to by the commissioners; and the legislature on the 12th of August, 1758, passed an Act to give effect to this agreement.

This Act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts, 'that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law usage or custom to the contrary thereof, in any wise notwithstanding.'

In virtue of this Act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey.

The Indians continued in peaceful possession of the lands thus conveyed to them until some time in the year 1801, when, having become desirous of migrating from the State of New Jersey, and of joining their brethren at Stockbridge, in the State of New York, they applied for, and obtained an Act of the Legislature of New Jersey, authorizing a sale of their land in that State.

This Act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the Act, under which they were purchased and settled on the Indians.

In 1803, the commissioners under the last recited Act sold and conveyed the lands to the plaintiffs, George Painter and others.

In October, 1804, the Legislature passed an Act repealing that Section of the Act of August, 1758, which exempts the lands therein mentioned from taxes. The lands were then assessed, and the taxes demanded. The plaintiffs, thinking themselves injured by this assessment, brought the case before the courts in the manner prescribed by the laws of New Jersey, and in the highest court of the State, the validity of the repealing of the Act was affirmed and the land declared liable to taxation. The cause is brought into this court by writ of error, and the question here to be decided is, does the Act of 1804 violate the Constitution of the United States.

The Constitution of the United States declares that no State shall 'pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.'

In the case of Fletcher v. Peck, it was decided in this court on solemn argument and much deliberation, that this provision of the Constitution extends to contracts to which a State is a party, as well as to contracts between individuals. The question then is narrowed to the enquiry whether in the case stated a contract existed and whether that contract is violated by the Act of 1804.

Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the

title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then in consideration of the arrangement previously made, one of which this Act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced.

It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the State, with all its privileges and immunities. The purchaser succeeds, with the assent of the State, to all the rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

Judgment of the Supreme Court of New Jersey reversed.

State of New Jersey v. Wilson, 7 Cranch, p. 164.

A similar question also to the one presented here was considered by the Circuit Court of the United States of the Sixth Circuit, in 1855.

It arose out of the terms of the Act of Congress of April 19th, 1816, which was an Act to authorize the people of Indiana Territory to form a Constitution, and the irrevocable ordinance of the people

of the territory accepting the propositions contained in the Act, one of which was that all lands sold by the United States in Indiana after the first of December, 1816, should be, and remain, exempt from any tax until the expiration of five years from the date of sale. Later, however, and in 1847, Congress assented that certain States admitted prior to April 4th, 1820, might impose a tax upon all lands that might be sold by the United States from and after the day of sale. The Indiana Legislature did not act, however, until the year 1852. The complainant purchased his lands in 1851, while the said ordinance of the people remained in force. After its repeal, in 1852, as aforesaid, the county attempted to impose a tax upon the lands of the complainant. He challenged the validity of the assessment on the ground that his lands, having been purchased in 1851, before the repeal of the ordinance, were exempt for the full period of five years, and that the taxation of same would be a violation of his exemption right. The principles announced in this decision are directly in point on the issue here, and the decision is worthy of the earnest consideration of the court.

It is as follows:

> "This is a bill to enjoin the defendant from collecting taxes alleged to have been illegally assessed, on the lands of the complainant, in Benton County, Indiana, for the year 1853. It is averred that the lands were and are yet taxable; because at the time of the purchase, which was in March, 1852, the laws of the State then in force, excepted from taxation, 'all lands sold by the United States until the term of five years from the day of sale shall have expired.' Rev. St. 1843, 208. This exemption was no doubt

induced by the Act of the 19th April, 1816, 'to enable the people of Indiana Territory to form a constitution,' etc., and the irrevocable ordinance of the people of the territory accepting the propositions contained in the Act, one of which was, 'that all lands sold by the United States after the 1st of December, 1816, should be and remain exempt from any tax until the expiration of five years from the date of sale.' Congress by its Act of the 26th of January, 1847, assented that the several States admitted into the Union prior to the 4th of April, 1820, may impose a tax upon all lands that might be sold by the United States, in said States, from and after the day of sale. But the law of Indiana exempting such land from taxation remained in force until the 17th of June, 1852. The complainant purchased his lands in Benton County, in March, 1851, more than a year before the exemption was repealed. At the time the complainant purchased his land, a law of the state exempted it from taxation for five years from the time of purchase, and this it is contended, is not a contract between a State and the complainant. What is a contract? By the Supreme Court, and by everybody, it is defined to be an agreement to do or not to do a certain thing. As in the case before us, by this law, the State agreed not to tax land purchased of Congress within the State, for five years after the purchase. Here is a stipulation, as express as words could make it, to all purchasers; and every purchaser accepts the proposition by making the purchase. Here is a contract as express as words can make it. * *

It is argued that if the land in question be exempted from taxation on the same principle, the land purchased by revolutionary soldiers in the State would forever be exempted from taxes. The law, at present, exempts the lands of revolutionary soldiers from taxation, consequently a purchase by such soldiers of land in

Indiana would make the exemption perpetual. Now this case has no analogy whatever to the one under consideration. The exemption in the one case is for the term of five years, in the other it is for the present, not for any specific time or for all time to come, but merely from present taxation. In the one case, it is a matter for the exercise of the discretion of the Legislature, in the other no such discretion can be exercised, as the exemption is for five years. In the one case there is a specific contract, in the other there is no contract; and no obligation to extend the exemption beyond the present time; the next year the law may be repealed, and there is no ground of complaint; but in the other a repeal of the exemption before the termination of five years, would impair the obligation of the contract.

The Legislature of Arkansas chartered a bank on the funds of the state, and provided in the Act that the notes of the bank should be receivable in payment of public dues to the State. By an improper management of the bank its specie became exhausted so that is could no longer pay the specie for its notes; the notes consequently were discredited, and the State refused to receive them in payment of taxes, and the Legislature repealed the Section declaring the notes should be received in payment of public dues. A tender being made of the notes to the treasurer, or by the treasurer in paying an amount due the State, the notes were refused, and suit was brought by the State against the debtor. In the Supreme Court of the State a judgment was entered in behalf of the state against the defendant, the court holding that after the repeal of the above section, the notes could not be paid into the State treasury.

A writ of error was presented to the Supreme Court of the United States, which decided that every individual who held a note of the bank

at the time of the repeal, had a right under the charter to pay it into the State treasury for public dues, and that, as against such holders of the notes of the bank, the Act of the Legislature of Arkansas impaired the obligation of the contract between the State and the holder, and was, consequently, void. But that notes received subsequent to the repeal were not so payable. The State being the owner of the bank had a right to repeal the charter, but that, by such a repeal, it could not impair the right of the holder of the paper received before the repeal, and under the guaranty that the notes should be receivable in payment of debts to the State.

The case before us is a much stronger one than that referred to from Arkansas. In Hanna v. Board of Com'rs of Allen Co., 8 Blackf. 352, the court says 'the purchasers could not complain, because the first Act contained no exemption, express or implied, and by the second the right to repeal the Act exempting the lands from taxation was expressly reserved in the Act itself.' The court, however, say, 'if no reservation had been made of the right to repeal the Act of 1834 (Laws 1834, p. 343) we should certainly have been obliged to conclude that the State was deprived of the power of taxing the lands therein referred to,' etc. This point, it was true, was not involved technically in the case, but in effect it was, when the court was obliged to put the power to repeal on the reservation in the Act; consequently, if there had been no reservation, there could have been no power to repeal. The injunction heretofore allowed in this case is made perpetual, at the costs of defendant."

Thompson v. Holton, No. 13958, 23 Fed. Cases, Page 1049.

The Court will observe in this case some features very analogous indeed to those presented in the case

at bar. The exemption in the Indiana case was based upon an Act of Congress, which authorized the people of Indiana Territory to form a Constitution and be admitted into the Union; in other words, the Enabling Act of Indiana. The people of the Territory were required, as usual in such matters, and as the people of Oklahoma, to accept the conditions imposed by Congress. In the ordinance adopted by them, accepting the terms of admission, they adopted and ratified the provision of the Act of Congress exempting from taxation all public lands sold for a period of five years from the date of sale. In the case at bar, the Government entered into agreements with the Indian tribe. Acts of Congress embodying these agreements were passed, and rights became fixed thereunder by the full performance of the agreements on the part of the Government and the Indians. After this was all done, Congress in 1908, as it did in 1847, as to Indiana lands, passed an Act by which such lands might be subjected to taxation by the authorities of the State. This was done, however, subsequent to the 16th day of November, 1907, when the people of Oklahoma, by Section 270 of their Constitution, ratified and confirmed all existing rights of the Indians under treaty with the Government. Upon the principles announced in the decision above neither the Act of Congress of 1908, nor any Act of the State of Oklahoma, could affect in any manner these exemption rights, which had become vested and fixed in the persons claiming them under the said agreements and legislation.

In his eminent work on the Constitution, Judge Cooley lays down the following principle:

> "So far as the power of taxation is concerned, it has been so often decided by the Supreme Court of the United States, though not without

remonstrance on the part of the State courts, that an agreement by a State for a consideration received or supposed to be received, that certain property, rights, or franchises shall be exempt from taxation, or be taxed only at a certain agreed rate is a contract protected by the Constitution, that the question can no longer be considered an open one."

Cooley's Constitutional Limitations, 7th Ed., page 395.

The case of Poindexter v. Greenhow, treasurer, 114 U. S., page 270, likewise discusses the principle under consideration here. In that case the State of Virginia, under the Funding Act, passed by its Legislature in 1871, provided that the coupons of the bonds issued should be receivable at and after maturity for all taxes, debts, dues and demands due the State. After certain coupons had been acquired under the law, the Legislature passed a subsequent Act prohibiting the acceptance of these coupons in payment of taxes. A tender of coupons in payment of his taxes was made by Poindexter, and refused by the treasurer, and the treasurer proceeded in the regular way in such matters to seize and sell other property of the complainant to satisfy his tax indebtedness.

The question of the right of a State to pass a law after the coupons had been acquired, which would in any way destroy their effect as property, and to prohibit their receipt in discharging the taxes, was directly presented to the Court, and a conclusion reached in harmony with those of the cases above.

As the opinion is lengthy, and as numerous other questions were considered, we quote briefly from the *syllabi* on the point at issue, as follows:

"7. The Act of the General Assembly of Virginia of January 26th, 1882, to provide for the more efficient collection of the revenue to support Government, maintain the public schools, and to pay interest on the public debt, requiring tax collectors to receive in discharge the taxes, license taxes and other dues, gold, silver, United States Treasury notes, national bank currency, and nothing else, and thereby forbidding the receipt of coupons issued under the Act of March 30th, 1871, in payment therefor, although it is a Legislative Act of the Government of Virginia, is not a law of the State of Virginia, because it impairs the obligation of its contract and is annulled by the Constitution of the United States.

8. The State has passed no such law, for it cannot; and what it cannot do, in contemplation of law, it has not done. The Constitution of the United States, and its own contract, both irrepealable by any Act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. This strips the defendant of his official character, and convicts him of a personal violation of the plaintiff's rights, for which he must personally answer.

9. It is no objection to the remedy in such cases, that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a Constitutional right, for the cases are numerous where the tax laws of a State, which in their general application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Con-

stitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

In Fletcher v. Peck, 6th Cranch, page 87, will be found a decision by Chief Justice Marshall, in which principles, applicable here, are announced so comprehensive and fundamental, that they ought not be overlooked in the consideration of this case. The questions there arose over the right of the Legislature of Georgia to annul titles of property which had been acquired from a person who had received the same under a Legislative grant from that State. It was sought to annul the grant on the ground of the corruption of the Legislature, and to restore the lands to the State of Georgia. We call attention to a few of the principles announced in that case, as follows:

"The principle asserted is that one Legislature is competent to repeal any act which a former Legislature was competent to pass; and that one Legislature cannot abridge the power of a succeeding Legislature.

The correctness of this principle, so far as respects general legislation can never be controverted, but if an Act be done under a law, a succeeding Legislature cannot undo it; the past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applica-

able to the case of every individual in the community.

It may well be doubted whether the nature of society and of Government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

The validity of this recinding act, then, might well be doubted, were Georgia a single sovereign power, but Georgia cannot be viewed as a single unconnected sovereign power, on whose legislation no other restrictions are imposed than may be found in its own Constitution. She is a part of the large empire, she is a member of the American Union; and that Union has a Constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none claim a right to pass. The Constitution of the United States declares that no State shall pass any bill of attainder, *ex-post facto* law, or law impairing the obligations of contracts.

Does the case now under cosideration come within this prohibitive section of the Constitution? In considering this very interesting question, we immediately ask ourselves, what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing; such was the law under which the conveyance was make by the Governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchaser was executed by the grant. A contract executed, as well as one which is executory, contains obliga-

tions binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyance. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected."

The law in force at the time a contract is made, and with reference to the terms of which, the contract is entered into becomes a part of the contract. A repeal of such a law which would have the effect of in any manner disturbing the rights acquired under the law, would be, therefore, an Act of legislation impairing the obligation of the contract, of which the law repealed was a part. If, in law, a grant is an executed contract, and the Constitution protects both executory and executed contracts, it therefore protects a grant. It follows from this that rights accruing under a legislative grant cannot be disturbed.

In his work on contracts, 9th Ed. Vol. 3, page 353, the eminent author, Parsons, states the well supported rule, as follows:

> "It seems to be settled conclusively that a grant is a contract; executed, it is true, but still a contract; and that it comes within the scope of this provision (referring to Sec. 10, of Article 1 of the Constitution) and therefore if there be a grant, in itself valid, any law which is, or permits a direct interference with enjoyment of the things granted, or a diminution of their value, or any deprivation of the things granted, or the rights or interests belonging to them by the grantor, impairs the obligation of the contract."

Upon the principle thus announced, if the homestead of the plaintiff in this case should be construed as a grant from the Government, the rights under the grant cannot be disturbed by acts of legislation, and the exemption from taxation being a vested property right, can not in such manner be disturbed.

Having considered the effect of the provision of the Federal Constitution, which prohibits the legislatures of the States from passing laws impairing the obligation of contracts, and having seen what under the authorities constitutes a contract, coming within the scope of the prohibition, we shall now give our attention briefly to the principles and authorities under which the National Legislature is likewise restrained from doing those same acts.

II.

Section 10 of Art. 1 of the Constitution of the United States which provides, among other things, that no State shall pass any law impairing the obligation of contracts, does not in terms prohibit Congress from passing such a law; but, except in those instances where such a law may be passed in the exercise of an express or a necessarily implied

power under the Constitution, the Congress is on principle as much prohibited from so doing as the Legislatures of the States. The protection of property rights is one of the fundamental purposes of Government, one consideration of the social compact; and the exercise of a power by a Legislature, which would impair the obligation of contracts or imperil security in private property, whether prohibited or not, would be subversive of the fundamental principles upon which governments rest. Only the exercise of a governmental power, regarding matters of the gravest public concern, would justify such a course; and in that event, the power would have to be exercised so as to uniformly affect the whole people; no special class or individuals could be singled out as victims of its operation

Sinking Fund Case, 99 U. S., *l. c.* 718-9;
Calder v. Bull, 3rd Dallas, 388.
Miller on Constitution, 529-30;
Legal Tender Cases, 12 Wall. 457.

The action of the authorities in the State of Oklahoma, seeking to assess and levy taxes upon the homesteads of the Indians of less than half blood in the Creek Nation, is not based directly upon any authority conferred by the action of the Legislature of Oklahoma. No law has been passed by that Legislature intended directly to affect this class of land. The levy is attempted under the general revenue laws of the State which were in force at the time the Act of Congress of May 27th, 1908, was passed. It is assumed by these officials that the treaty obligations and the restrictions imposed by law upon the taxation of this class of property have been removed by the latter Act, and that the lands in question, therefore, come properly under the

general revenue laws of the State for taxation. It has been seen from the authorities referred to under the preceding head note that an exemption from taxation is a property right, and that a contract for an exemption is such a contract as is protected by Section 10 of Article 1 of the Constitution of the United States, a contract, the obligation of which could not be impaired by any Act of a Legislature of one of the States of the Union.

It will, however, be contended that the said Constitutional provision does not impose any inhibition upon the National Congress to pass such laws. This argument in the first place overlooks entirely the protection to property rights found in the 5th and 14th amendments to the Constitution. But the contention is likewise fallacious upon the higher ground, that to deprive one of property without due process of law, or by Act of legislation to impair or destroy the obligation of a contract, is entirely beyond legislative power.

The protection of private property is one of the first considerations of all Government; to be secure in the undisturbed ownership and possession of rights and property legitimately acquired is one of the essentials of social order, one of the fundamental purposes of Government. The power can therefore not exist in the Legislature, which is but one arm of the Government, to do those Acts which undermine and destroy the foundations of Government.

It was not necessary that the Constitution should contain the prohibition against the doing of a thing, which no Government or any department of Government has the power to do. The principles which protect the obligation of contracts and the security in private property are so fundamental that the State Legislatures would have been powerless to ig-

nore them had the Federal Constitution been silent upon the subject. These principles emanate from sources higher than written Constitutions. They are found in the aggregate purpose of men to establish social order, out of which Constitutions arise.

The sinking fund cases, the opinion in which will be found in Union Pacific Ry. Co. v. United States, 99 U. S., page 718, are sometimes referred to as an authority in support of the proposition that the National Congress is without restraint, in the passage of Acts impairing the obligation of contracts. Such a view is in total misapprehension of the principles which govern in that case, as will be seen on an examination of the ground upon which the conclusion of the Court was based. It is true that the Act of Congress, complained of by the railroad as being in violation of rights acquired by it under previous legislation, amounting to a contract, did in effect impair the contract held by the railroad. but the Court in sustaining the latter Act, did not do so upon the ground that Congress possessed any such power, but on the contrary, denying such power to exist, justified the Act upon the ground that a right of repeal or amendment of the former Act was reserved within the Act, and that all rights thereunder, were acquired subject to the right of Congress to modify the terms of the Act; but during the course of the opinion some comments are made that are worthy of attention.

The facts in the case are briefly as follows:

By Acts of Congress of 1862 and '64, the Government undertook to aid in the construction of the Union Pacific Railroad by loaning its credit. The construction bonds guaranteed by the Government were not payable before thirty years from their date. The railroad company long before the time for the

payment of these bonds increased the bonded indebtedness of the road many millions of dollars and apprehending that this policy of increasing the indebtedness might continue to the extent of impairing the ability of the road to repay the Government, Congress enacted another law in 1878 providing for a sinking fund and required the railroad company to deposit in the treasury of the United States, to be held as a sinking fund to protect the Government, a certain portion of its net earnings each year, upon which the railroad was allowed interest. The Acts of Congress granting the charter of this company and providing for aiding in the construction of the road reserved the right to amend the charter. The constitutionality of the law of 1878 was attacked on the ground that Congress was without power to enact the sinking fund law making provision for the payment of this debt and that the latter law was unconstitutional as impairing the obligation of a contract and disturbing vested rights. This law was sustained, however, as being within the reserved power of Congress to amend the charter, and on the further ground that it did not impair any contract or violate vested rights, but during the course of the opinion the Court uses language announcing some well settled principles of law that are applicable here, from which we quote as follows, from the opinion of Chief Justice Waite:

> "The United States cannot any more than a State interefere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legis-

late back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Also,

"We are of the opinion that Congress not only retains but has given special notice of its intention to retain full and complete power to make such alterations and amendments to the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made."

In considering a cognate question, Attorney General Griggs, in an opinion rendered by him, uses the following language:

"It is not improbable, however, than any Act of Congress which should provide for the repudiation of any substantial part of a valid contract would be obnoxious to those other provisions of the Federal Constitution which are intended to protect the citizen and his property against arbitrary seizure and confiscation."

22 Op. Atty. Gen. 194.

One exception to the general proposition that Congress cannot pass laws impairing the obligation of contracts will be found in the provision of the Constitution authorizing the enactment of general bankruptcy laws. This is an express authority for the violation of that general principle to which the people of all the States have assented, and is supposed to be justified by a sound public policy. The theory, at any rate is in harmony with the course of all progressive governments. This express power, relative to bankruptcy laws, found in the Constitution, is sometimes suggested as the reason for the instrument not containing a prohibition upon the National Legislature like that imposed upon the Legislatures of the States. In discussing the question, Mr. Justice Miller, in his eminent work on the Constitution, uses the following language:

> "Indeed that could not have been forbidden consistently with other powers vested by that instrument in Congress; for Section 8, Clause 4, confers upon Congress the power to establish 'uniform laws on the subject of bankruptcies throughout the United States.' Of course any system of bankruptcy with which we are familiar, however it may be in Continental Europe, includes a discharge of the debtor from his debts, and a distribution of his property among his creditors. It, therefore, necessarily implies the power of impairing the obligation of a contract, and even the discharge of it altogether." Secs. 529-30.

It must be observed, we think, that upon the foregoing authorities, the principle is established and settled that the National Legislature is as powerless to pass an Act impairing the obligation of contracts, as the Legislatures of the States, except where done in carrying out some express or necessarily implied

power of the Constitution or in the exercise of a power for the public welfare, and that in all other instances such legislation would be obnoxious to the principles underlying free institutions.

Before passing the subject, however, we direct the attention of the Court to the language of Mr. Justice Chase in Calder v. Bull, 3rd Dallas, 388, an early case in which principles are announced that have never been departed from by the courts. We quote as follows:

> "The People of the United States erected their Constitutions or forms of Government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, legislature cannot do without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the Government was established. An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation

of a law in governments established on express compact, and on Republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract or the right of private property. To maintain that our Federal or State Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free Republican governments."

We think it must be concluded in the light of the principle involved as well as the authorities, that if the contract made between the Creek Tribe of Indians and the Government and enacted into law by Congress, under which this exemption right was guaranteed, is not to be preserved and held inviolate by the courts, it is solely upon the ground

that the beneficiary is an Indian. No such a contract, whether made with a natural or artificial person, has heretofore been denied protection by the courts. We, therefore, turn in the natural order of the discussion to an examination of the principles which have been established relative to dealing between the Government and the Indians and to the laws which define their present status. If they are to be subjected to a hardship and a violation of rights from which all other men, citizen and foreigner, artificial as well as natural persons, institution, communities and States, are immune under the Constitution, some reason must be found.

III.

A treaty or agreement between the Government and an Indian Tribe is as binding from every legal standpoint as a treaty between the Government and a foreign State; but because of that relation between the Government and the Indian, which, through the superior power of the former, the latter is made dependent on its will and subject to its authority, the agreements and treaties made with the Indians involve a higher moral obligation on the part of the Government than if made with an independent State.

Where, under such circumstances, an agreement has been made between the strong and the weak, the independent and the dependent sovereignties, and property rights thereunder acquired by the latter in reliance solely upon the good faith of the former, it would be repugnant to every instinct of justice and morality to contend that the rights so acquired may be violated, simply because the power

exists so to do; and although conceding that power in the abstract to exist, nevertheless, no considerations other than those of public policy of the greatest moment would justify its exercise.

United States v. Winans, 198 U. S. 371;
Kansas Indians, 5 Wall. 737;
Worcester v. Georgia, 6 Pet. 515;
Jones v. Meehan, 175 United States 1;
Choctaw Nation v. United States, 119 U. S. 1;
Lone Wolf v. Hitchock, 187 U. S. 565;
United States v. Kagama, 118 U. S. 375;
Cherokee Nation v. Hitchcock, 187 U. S. 294;
United States v. Rickert, 188 U. S. 432.

We call attention here to some specific utterances of our Supreme Court, with a view of sustaining the position that because of the situation of the parties an agreement made by the Government with an Indian Tribe is to be construed favorably to the understanding of the Indian. In the case of United States v. Winans, 198 U. S. 371, the issue arose over the construction of a treaty made between the Government and the Yakima Indians. In that case, the rights of the Indian Tribe under a treaty, as the Indian interpreted the treaty, had been interfered with by citizens of the State of Washington, and the lower Court decided adversely to the contention of the Indian. In an opinion, reversing the Circuit Court, the Supreme Court uses the following language:

> "And we have said we will construe a treaty with the Indians as that unlettered people understood it, and as 'justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance

of the right, without regard to technical rules.'" (Citing authorities.)

If this principle is to be observed, and the rule of construction there announced is to be maintained, there could be no possible doubt as to the result of this issue, for no candid mind can doubt that when the agreements relied on here providing for this exemption were made, the Indian understood that the small amount set apart for use as a homestead for which he received a separate deed, would be exempt from taxation and civil burdens of all kinds, for the full period of twenty-one years from the date of his deed.

The same principle was announced in the well known case concerning the Kansas Indians, 5th Wallace, page 737, from which we quote *syllabus* No. 3 as follows:

> "Rules of interpretation favorable to the Indian Tribe are to be adopted in construing our treaties with them, hence, a provision in an Indian treaty which exempts their lands from levy and sale and forfeiture, is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers, also for non-payment of taxes."

In Jones v. Meehan, 175 U. S. at page 11, the following language is used:

> "And that the treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

In Choctaw Nation v. United States, 119 U. S. *l. c.* 28, the court uses the following language:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States, of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws."

In Lone Wolf v. Hitchcock, 187 U. S., page 566, the Court uses the following language:

> "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."

We have referred to the foregoing expressions of the Court uttered concerning situations varying in time and circumstance for the purpose only of calling

the attention of this Court to the policy of the Government as understood and interpreted by the Supreme Court relative to the good faith that is to be exercised in construing treaties and agreements made with the Indian tribes. From the beginning of the Government, it has been the policy to resolve doubtful constructions in the Indian's interest, and as we shall attempt later to show, no instance can be found in which the Supreme Court has sustained a construction of an agreement with an Indian affecting his property rights, otherwise than in his favor, and in accordance with his understanding of the rights which he would have under the agreement.

Mr. Justice White, in the opinion in Cherokee Nation v. Hitchcock, 187 U. S., above, *l. c.* 307, uses language very significant in view of the nature of the question here. The issue in that case involved the validity of the Act of Congress approved June 28th, 1898, giving the Secretary of the Interior full power over the leasing of oil and mineral lands, etc. After reviewing many authorities asserting and reasserting the plenary power of Congress to legislate concerning the control and disposition of tribal property he concludes in the following language:

> "There is no question in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the Act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

So it is the "control and development of the tribal property" over which the Government exercises through Congress its plenary power. It is that

class of property which still "remains subject to the administrative control of the Government." But it is most significantly observed that, **"There is no question in this case as to the taking of property."** The distinction between controling and taking is, indeed, far reaching.

IV.

Repeals by implication are not favored. Unless express terms are used, or the repugnancy of the statutes is so great as to be irreconcilable, the former statute will stand and no intent to repeal will be presumed. And, where rights have been acquired under the statute it can only be repealed by express terms, showing an unmistakable intention so to do. But when thus repealed the rights acquired thereunder cannot be divested or disturbed. It is likewise true that many statutes are, and must be, construed with certain exceptions from the effect of their general operation. This is necessary in order that other statutes, under which rights have become fixed, and which would otherwise be repealed, may still be operative to the extent of preserving such rights

Cooley's Constitutional Limitations, 7 Ed. page 216-7;
Frost v. Wenie, 157 U. S. 46;
United States v. Lee Yan Tai, 185 U. S. 220-3;
United States v. Healey, 160 U. S. 145-6;
United States v. Kirby, 7 Wall. 486;
Carlisle v. United States, 16 Wall. 153;
Market Co. v. Hoffman, 101 U. S. 116;
McKee v. United States, 164 U. S. 287;
Ex parte Steel, 162 Fed. *l. c.* 704-5.

Section 4 of the Act of May 27th, 1908, is general in its application to lands of the Five Civilized Tribes of Indians. The subject upon which the statute can operate is still extensive, if the homesteads of citizens of the Five Tribes are excluded. We shall attempt to show in the course of the discussion that there are different classes of lands, at one time under restriction, which no general Act of Congress has specifically subjected to taxation, and that if there is a subject upon which the statute can operate exclusive of the class of lands in controversy, the statute can well be considered to have application only to such subject; especially would this be true if including within its operation, this class of lands, would violate existing and fixed rights. There is nothing whatever in the terms of this statute that indicates in the slightest degree that it was the purpose of Congress to repeal the provisions of the Acts of 1901 and 1902, relative to the exemption from taxation of the homesteads of the Indians. Repeals by implication are not favored by the law, and a repeal by implication which would violate private rights already acquired under the statute repealed, is hardly to be considered. Where, as in this case, rights have become fixed under a statute previously enacted, and a later statute literally construed would violate those rights, the courts will look, in order to sustain the later statute, for subjects upon which it may operate without violating such rights, and if found, in such case, will give the statute a construction which will exclude from its operation those subjects with reference to which rights have been acquired, and thus, by such exception from the operation of the statute, protect the rights so fixed.

Again, if the statute heretofore enacted, embody-

ing agreements in which these exemption rights were guaranteed, are to be considered repealed entirely by this later Act, then the question arises as to what effect such a repeal can have upon rights acquired under the former statute before its repeal. As to that, we submit, without fear of contradiction, that the rights so acquired prior to the repeal cannot thereby be disturbed. True it is, that in the very nature of legislative power, it would be impossible for one Congress to tie the hands of a future Congress, and for this reason one Congress cannot, by specific provisions, or otherwise, prevent a subsequent Congress from repealing the Acts of a former Congress. And it is likewise true that an Act of Congress may supercede or repeal the provisions of a treaty made with a foreign state, or an agreement made with an Indian tribe. But this statement does not comprehend the full scope of the question under consideration. We concede that proposition as a matter of course, but the rule stops there, and the power and the right of the Legislature does not go further, and if rights have been acquired under a valid Act of Congress, treaty or agreement, then notwithstanding these may be repealed, still, the rights so acquired cannot be affected by such repeal; and while Congress may discontinue the operation of treaties and agreements made with the Indian tribes which affect their political and tribal rights, and while it may change and modify those agreements and change its policy and its relation to these tribes, and compel them to accept such changes, it can go no further than this. There is no power in Congress to deprive an Indian of a vested property right, nor can it be presumed that Congress ever intended so to do. As said in United States v. Kirby, 7th Wall. 486:

"All laws should receive a sensible construction; general terms should be so limited in their application as not to lead to injustice, oppression or to absurd consequence. It will also therefore be presumed that the Legislature intended exceptions to its language, which will avoid results of that character. The reason of the law in such cases should prevail over its letter."

And as said again in Carlisle v. United States, 16th Wall. 153:

"All general terms in the statute should be limited in their application so as not lead to injustice, oppression or any unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character."

In Market Co. v. Hoffman, 101 U. S. 116, the Court refers to an earlier case in language as follows:

"It was said to be the undoubted duty of the Court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the Court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

We call the attention of the Court to the above, McKee v. United States, 164 U. S., page 287. In this case an Act of Congress is construed, excepting from the operation of the Act entensive subject-matter that the literal terms of the Act clearly included. This was done upon the broad ground that the literal application of the statute would work an injustice (in this instance on the Government) that could not have been intended by Congress, and that because of

such injustice, Congress could not be presumed to have intended the statute to have such an effect, and that it was the duty of the Court to construe the statute with an exception from its general terms. We quote from page 293 of the opinion as follows:

> "It is true that if the language used in that last clause be given its widest and broadest application, it would include all owners of real estate which had been sold in any portion of the country under the provisions of the Direct Tax Act, but we think a perusal of the whole Act prevents us giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole Act. Under such circumstances it is not only the right, but it is the plain duty of the Court to limit by a proper construction, the otherwise boundless application of the general language used in the statute." (Citing authorities.)

We direct attention next to the case of Frost vs. Wenie, 157 U. S., page 46. This decision is valuable because of the striking analogy between the issues there and in this case. The facts in that case are, briefly stated, that the Osage Indians were the owners of certain lands known as the "trust and diminished reserve lands" in the State of Kansas and within the Fort Dodge military reservation. Under treaty agreements previously made between the Government and the Osage Indians these lands were not to be disposed of for a less price than provided for pre-empted lands under the pre-emption law of the United States, which was a higher price than required by the Government for lands taken under the Homestead Act. In May, 1880, in an Act for the relief of settlers upon the Osage trust and diminished reserve lands it was provided that all lands remain-

ing unsold and unappropriated should be disposed of to persons having the qualifications of pre-emptors on the public lands. This enactment was in harmony with the previous stipulations between the Government and the Indians. On December 15th, 1880, however, an Act of Congress was passed, directing the Secretary of the Interior to cause a survey to be made of certain lands in the State of Kansas, including these trust lands, and to offer the same for sale to settlers under the Homestead Laws of the United States. A sale under these laws would have violated the stipulations, previously made, as well as the Act of May 28th, 1880, authorizing the disposal of the lands under the pre-emption laws. No doubt can be expressed that the Osage trust lands were directly included within the terms of the latter Act. In discussing the rule of construction, applicable to such statutes, the Court, through Mr. Justice Harlan, uses the following language:

> "Did Congress intend, by the Act of December 15, 1880, to open to entry by homesteaders lands of the class which, by the Act of May 28, 1880, were open to entry only by actual settlers having the qualifications of pre-emptors?
>
> It is to be observed that although the words of the Act of December 15, 1880, are broad enough, if literally interpreted, to embrace **all** the lands within the abandoned Fort Dodge military reservation north of the Atchison Railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the Court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not

be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute. (Citing authorities.)

There is an interpretation of the Act of December 15, 1880, that will give effect to its provisions, and at the same time leave untouched the prior Act as expressing the will of Congress in respect of the Osage trust and diminished reserve lands. That interpretation assumes that Congress did not intend by that Act to prescribe for the Osage trust lands within the limits of the abandoned Fort Dodge military reservation, north of the Atchison Railroad, any different rule of policy than had been prescribed by the Act of May 28, 1880, for all such trust lands wherever situated. Excluding from the operation of the Act of December 15, 1880, any lands affected with an express trust in favor of Indians, that is, construing it as applying only to public lands, strictly so called, which the United States could dispose of without any breach of good faith or violation of treaty obligations, there is no difficulty in giving effect to the provisions as well of that Act as of the Act of May 28, 1880, without infringing any established principle for the interpretation of statutes. No trace can be discovered in the various legislative enactments relating specifically to the Osage trust lands of any intention, upon the part of Congress, to disregard the terms of its treaty with the Osage Indians; and, consequently the Act of December 15, 1880, should not be construed as impairing the rights of the Indians, unless such a construction be unavoidable. It is not unavoidable. Looking at that Act, in connection with prior statutes, particularly that of May 28, 1880, we are of opinion that the lands

which the Act of December 15, 1880, directed to be opened for entry under the homestead laws, were public lands that were within the abandoned military reservation, and subject to disposition under general laws relating to "other public lands," and not lands of an exceptional class that were affected with a trust established for the benefit of Indians by treaty. Acting Secretary of the Interior Muldrow said: 'However we may construe the Act of December 15, 1880, with reference to the disposal of the greater part of the reservation relinquished by said Act lying north of the Osage lands, it should not be so construed as to impair or defeat the rights of the Indians guaranteed by the treaty of 1865.'

Application having been made to Secretary Vilas for a review of that decision, that officer, among other things, said: 'I am satisfied that Congress, by the Act of December 15, 1880, had no intention of repealing the Act of May 28, 1880, or any portion thereof, since such repeal would work an impairment of the rights guaranteed to the Indians by the treaty of 1865. Especially do I think this view is warranted in the absence of any express words of repeal; for had Congress intended a repeal the effect of which would be to disregard treaty obligations, or to defeat or impair treaty rights, I feel certain it would have expressed that intention in plain words and not left it to implication. How, then, is the Act of December, 1880, in so far as it is in apparent conflict with the Act of May 28, 1880 (which is as to less than three sections of land), to be construed? Manifestly, the intention of Congress can be ascertained only by a consideration of the treaty of 1865, and the two Acts above mentioned *in pari materia;* and so considering them, I have no difficulty in arriving at the conclusion that the tract in question cannot be legally entered by Frost for the reason that, having made one Osage entry, he is not a qualified pre-emptor.' (6 L. D. 540.)

> We approve the construction placed upon the Act of December 15, 1880, by the Interior Department, and the decree is affirmed."

The above case is directly in point on the issue here and points out clearly the duty of the court in construing such statutes. It also recognizes that good faith must not be overlooked in dealing with such subjects, and that the Court may consider that question in determining the application of a statute, and give it such a construction as is consistent therewith.

In United States v. Lee Yan Tai, 185 U. S. 213, the court was called upon to construe the Chinese exclusion treaty of 1894, which, it was claimed, was in conflict with previous statutes of the United States relative to Chinese exclusion. No direct provision for exclusion on the grounds attempted in this case had been provided in the treaty of 1894, but the case was covered by prior legislation of Congress. It was held by the Court that a treaty might supercede a statute in the same sense and to the same extent that a statute might supercede a treaty. That both, when constitutionally enacted, are the supreme law of the land. Because a specific right for exclusion upon the grounds attempted was not provided in the treaty of 1894, it was maintained that no such grounds existed, for the reason that the treaty of that date had superceded all prior legislation and treaties. The Court held, however, that a writ of *habeas corpus* could not be maintained in that case, notwithstanding no grounds could be found for exclusion in the late treaty, and that the right to exclude existed under prior treaties and legislation which had not been specifically repealed by the treaty. In discussing the question the Court uses the following language:

> "In the case of statutes alleged to be inconsistent with each other, in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication, only *pro tanto* to the extent of the repugnancy, and that, if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be."

Citing and referring to Frost v. Wenie, 157 U. S., which we have referred to at length, above, and other cases.

As said in *Ex Parte* Steele, 162 Fed., *l. c.* 704-5,

> "Repeals by implication are not favored. If by any reasonable construction prior and subsequent statutes can each have some fair field of operation, that construction must prevail over any which denies all effect to former laws on the same subject."

In the Chinese Exclusion case, 130 U. S. 609 Mr. Justice Field, in discussing the effect of a repeal of a treaty by an Act of Congress, uses this language:

> "This Act, as seen, applied in terms only to the future. Of course, whatever of a permanent character had been executed or vested under the treaties was not affected by it. In that respect the abrogation of the obligations of a treaty operates, like the repeal of a law, only upon the future, leaving transactions executed under it to stand unaffected. * * *
>
> Again, the rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other

disposition, not such as are personal and untransferable in their character. Thus, in the Head Money cases, the Court speaks of certain rights being in some instances conferred upon the citizens or subjects of one nation residing in the territorial limits of the other, which are 'capable of enforcement as between private parties in the courts of the country.' 'An illustration of this character,' it adds, 'is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens.' 112 U. S. 580, 598. The passage cited by counsel from the language of Mr. Justice Washington in Society for the propagation of the Gospel v. New Haven, 8 Wheat. 464, 493, also illustrates this doctrine. There the learned justice observes that 'if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it.' Of this doctrine, there can be no question in this Court; but far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes."

In Fletcher vs. Peck 6 Cranch 87, it is said:

"When, then, a law is in its nature a contract, when absolute rights have vested under that con-

tract, a repeal of the law can not divest those rights." * * *

Let us now examine the Act of 1908, in which the said clause of Section 4 is found, upon which the right to tax the lands in question is based. Section 1 of this Act provides as follows:

> "That from and after sixty days from the date of this Act, the status of lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions or alienation or incumbrance, be as follows: 'All lands, including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians, having less than one-half Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads of said allottees enrolled as mixed-blood Indians, having half or more than half, or less than three-quarters Indian blood, shall be free from all restrictions. All homesteads of said allottees, enrolled as mixed-blood Indians, having half or more than half, of Indian blood, including minors of such degree of blood, and all allotted lands of enrolled full-blood, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April 26th, 1931, excepting that the Secretary of the Interior may remove such restrictions, whole or in part, under such rules and government concerning terms of sale disposal of the proceeds for the benefit of the respective Indians, as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from any land by or under any law prior to the passage of this Act.'"

It will be observed that this Act is made directly applicable to all the lands of the Five Civilized Tribes. The Act says the status of the land allotted heretofore or hereafter to the allottees of the Five Civilized Tribes shall, as regards restrictions, etc., be as follows. The Act is in the nature of a revision or substitute for former legislation affecting restrictions, containing modifications and amendments of prior laws and regulations. It would, therefore, not be at all surprising if the provisions of Section 4, under consideration, should be found in like manner to cover, in part, some matters previously provided for.

For convenience, we repeat here the clause of Section 4, relative to taxation:

> "That all lands from which restrictions have been or shall be removed, shall be subject to taxation and all other civil burdens, as though it was the property of other persons than allottees of the Five Civilized Tribes." (35 Stat. 312.)

We here call attention to the peculiar wording of Section 4. It uses the terms, from which restrictions **have been** or **shall be** removed. From this language itself it is evident that Congress had in mind transactions in the past, either legislative or departmental, upon which the statute would operate. It is equally evident that Congress contemplated future transactions of like character upon which the statute would operate. Had there been no purpose of this statute in the legislative mind other than its operation upon the lands affected by the provision of Section 1 of the Act above set out, there would have been no possible excuse or justification for the form of expression adopted by the law-maker. Had the purpose been to provide a statute as to taxation for the lands affected by this Act only, the language

would in all probably have been—that all lands from which restriction **are by this Act removed**, shall be subject to taxation, etc. But as the language contemplates both past and future transactions upon which the statute can operate, we will now examine briefly some previous legislation on the subject of restrictions, and also some of the provisions of the law authorizing departmental action also affecting restrictions.

It will not be overlooked that Section 1 of the Act of 1908 continues the authority of the Secretary of the Interior to remove restrictions as theretofore authorized in various Acts to do.

We now call attention to a proviso found in Section ———of the Act of April 11st, 1904 (33 Stat. L. 189) as follows:

> "And provided further, that the Secretary of the Interior is hereby granted authority to sell at public sale, any tracts, not exceeding 160 acres to any one purchaser, under rules and regulations to be made by the Secretary of the Interior, the residue of land in the Creek Nation, belonging to the Creek Tribe of Indians, consisting of about 500,000 acres, and being the residue of lands left over after allotments of 160 acres to each of said Tribe, and all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians, who are not of Indian blood, except minors, or except as to homesteads, are hereby removed, and all restrictions upon the alienation of all other allottees of said Tribes, excepting minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed, under such rules and regulations as the Secretary of the Interior may prescribe, upon application, etc."

This Act removes restrictions from a large class of

lands, without specific provision for the taxation of the lands.

It may be said by defendant, in response to the last statement, that no provision as to taxation was necessary, for that, when restrictions are removed, the land becomes a subject of taxation. But this argument goes too far. It would conclude, for the same reason, that all provisions regarding taxation are without purpose, and thus deny to him any benefits under the only statute giving color of right to his position, that is, Section 4 of the said Act of May 27th, 1908.

Section 22 of the Act of April 26th, 1906 (34 Stat. 137), also removes restrictions from a certain class of lands, and provides for the alienation thereof. The only provisions relative to taxation found in the latter Act is the preceding Section 19, the last clause thereof reading as follows:

> "provided further that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

This provision and the said Act of May 27th, 1908, are the only provisions for taxation affecting the Creek tribe.

Both the original and supplemental Creek agreement, recognizes the right of the Secretary of the Interior to remove restrictions from certain lands.

We call attention also to the first clause of Section 4 of the original Creek agreement, which reads as follows:

> "Allotments for any minor may be selected by father, mother or guardian, in the order named, and shall not be sold during his minority."

It will be seen from this provision that the restric-

tions upon the lands of minor Indians do not expire five years from the date of the supplemental Creek agreement, as in other cases, nor were restrictions removed from their lands by the Act of April 21st, 1904, above quoted, but on the other hand, their lands were specifically excepted from the operations of that Act. So it will be seen that not until the Act of May 27th, 1908, was it attempted by any Act of Congress to remove restrictions from the surplus lands of minors. In view of all this legislation affecting restrictions, and the probable inadequate provisions for taxation of the various classes of lands affected by the legislation, and affected likewise by departmental action, and the necessary uncertainty regarding the subject of taxation, it is most natural that Congress, in Section 4 of the Act of 1908, intended to make a definite provision applicable throughout the Five Civilized Tribes for the taxation of all lands which had at that time become proper subjects of taxation, but that only. Provision had likewise been made in several Acts for the Secretary to sell surplus lands, and there was upon the whole much property formerly affected by the tribal statute which had become free property as to which no specific provision had been made relative to taxation, and to clear all doubts on the question of its status in that regard, Section 4 of the Act of 1908, might well have been conceived without intending that the homesteads of Creek citizens, exempt under valid agreements and legislation, should be in any manner affected thereby.

Section 16 of the Supplemental Creek Agreement Act of Congress, June 30, 1902 (32 Stat. 500), provides that the lands allotted to the citizens of the Creek Tribe shall not be taken or sold to satisfy any debt nor be alienable by the allottee or his heirs be-

fore five years from the date of the approval of the said Supplemental Agreement, etc., etc. This Act was proclaimed by the President, August 8th, 1902, from which date the five-year period began to run. The five years' restriction, therefore, expired on August 8th, 1907. This fact is recognized in Tiger v. Western Investment Company, 221 U. S. 286. This five-year limitation, however, applied only to a part of the allotment, not including the homestead, as the same Section 16, as already shown, provides that the homestead shall be inalienable and non-taxable for twenty-one years. This legislation is mentioned here to direct the attention of the Court specifically to the fact that under the operation of that section, restrictions would have expired on the surplus lands of many Indians of the Creek Tribe, that is, on all of the allotment except the homestead, with the exception that by the Act of April 26, 1906 (34 Stat. 137), restrictions were extended on the lands of full-blood Indians. So it appears from this legislation that between August 8th, 1907, and the taking effect of the said Act of May 27, 1908, there were no restrictions on any of the surplus lands of the mixed-blood Indians in the Creek Tribe, nor had there been, until the said Act of May 27, 1908, any statute, which specifically authorized the taxation of the class of lands on which restrictions expired August 8, 1907, as aforesaid. We, therefore, find a large acreage of lands (all the surplus lands of the mixed bloods), concerning which no specific provision for taxation had been made, to which the said Section 4 may apply without affecting the homesteads of the class in controversy, which are all held under covenant of exemption.

An examination of the legislation affecting other

tribes will show that there were lands free from restrictions concerning which no specific provision for taxation had been made. For instance, in the agreement with the Choctaws and Chicasaws (30 Stat. 502), one-fourth of the lands could be alienated in one year, one-fourth in three years, and the balance in five years from the date of the patent. To all these lands the said Section 4 of the Act of May 27, 1908. may apply. And so we repeat that an extensive subject for the application of the said Section 4 of the Act of 1908 exists after these homesteads are accepted.

If we are correct in this view, then the proper construction of the Act under consideration would be with an exception from its application, of these homesteads, which were not proper subjects of taxation because of previous legislation, and which cannot, therefore, be presumed to have been included. This view is strengthened greatly by the language of the statute, giving it a past and prospective effect only as heretofore noticed. And this construction gives effect to the statute without disturbing fixed rights.

The legislation upon this subject is all in *pari materia,* and the Acts must all be construed together and given a harmonious effect, and one which does no violence to existing rights acquired under prior legislation.

As said in Kohlsaat v. Murphy, 96 U. S. *l. c.* 159:

> "In the exposition of the statutes, the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject they are all to be taken together, and one part to be compared with another in the construction of any one of the material provi-

sions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of the statute, or, where there is more than one in *pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous and inconsistent."

V.

The principles of law announced in New Jersey v. Wilson, 7 Cranch, 164 above, have been reiterated and affirmed by the Supreme Court in many subsequent decisions. The property right in an exemption from taxation, the contractual character of such a law, within the constitutional meaning, and the inviolability of such a right have all been considered in many decisions; and the right, under whatever circumstances it may have arisen, has at all times been held inviolate.

There are instances almost innumerable, and we refer to some of them, in which the courts have held that a grant of a franchise to a corporation with the exemption of its property from taxation for a limited term, if accepted and acted upon by the corporation, constitutes a contract between the corporation and the State or municipality granting the same, and that the rights of the parties thereto cannot be changed or modified by legislation. The rule has been exactly the same in cases where exemptions have been granted to churches, charities, public or private enterprises, and contracts of this character are of equal efficacy whether between States or municipalities and individuals or between two States.

In support of the rule here stated we refer the court to the following authorities, all of which refer with approval to the controlling principle of the New Jersey case.

Terrett v. Taylor, 9 Cranch. 43;
United States v. Arredondo and others, 6 Peters, 738;
Armstrong *et al.* v. The Treasurer of Athens Co., 16 Peters, 289;
Baldwin *et al.* v. Payne *et al.*, 6 Howard, 332;
The West River Bridge Company v. Dix *et al.*, 6 Howard, 542;
State Bank of Ohio v. Knoop, 16 Howard, 385 and 401;
Von Hoffman v. City of Quincy, 4 Wallace, 550-4;
Home of the Friendless v. Rouse, 8 Wallace, 438;
Salt Company v. East Saginaw, 13 Wallace, 376;
Tomlinson v. Jessup, 15 Wallace, 458;
Humphrey v. Pegues, 16 Wall. 244;
Morgan v. Louisiana, 93 U. S. 223;
Antoni v. Greenhow, 197 U. S. 803;
Louisiana v. Jumel, 107 U. S. 750;
Givens v. Wright, 117 U. S. 555;
Pearsall v. Great Northern Railway, 161 U. S. 662;
Jefferson Branch Bank v. Skelly, 1 Black, 436;
Great Northern Ry. Co. v. 25 Minnesota, 216 U. S. 206, *l. c.* 233.

In referring to the principle as announced in the New Jersey and other cases by the Supreme Court along the same line, it is said in the 4th Wallace, 550 above, that:

"The principles which they maintain are now axiomatic in American jurisprudence, and are no longer open to controversy."

In the Home of the Friendless v. Rouse, 8 Wall. *l. c.* 438 above, the following language is used:

"The validity of this contract is questioned at the bar on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that a State may, by contract based on a consideraion, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State if the Charter containing it is accepted." (Citing numerous authorities.)

In Terrett v. Taylor, 9 Cranch, 43, the court speaking through Mr. Justice Story, relative to rights in property acquired under the laws of Virginia, say:

"If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

Nor is this an old and abandoned doctrine. The principles are as vital today as when first announced by the Supreme Court. In Great Northern Ry. v.

Minnesota, 216 U. S., *l, c,* 233, above, speaking through Mr. Justice Harlan, the Court in approval of a former and earlier announcement of the court, say:

> "A distinction must not be overlooked when considering the assignability of a tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land, granted to a railroad company to aid in the construction of a railroad is specifically exempted from taxation until sold by the company, and the company accepts, in consideration of the exemption, the exemption attaches to and follows the land. New Jersey v. Wilson, 7 Cranch, 164; State v. Hicks, 30 Am. Dec. 423; Ry. Co. v. State, 75 Texas 356. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it. In the Stearns case the court determined only the question whether the lands of the railroad company were taxable. It held, upon the showing there made, that there was a valid contract with the railroad companies in respect to the taxation of the lands there in question which it was beyond the power of the State to impair by legislation."

Thus it will be seen, that from the earliest decisions of our Supreme Court to the latest decisions of that Court and permeating all judicial utterances on the subject will be found a rigid adherence to that principle that vested property rights shall be protected by the courts aginst hostile legislation; that principle has become fundamental in our jurisprudence.

VI.

By accepting the terms of the Act of Congress of June 16th, 1906, as amended March 4, 1907, known as the Enabling Act, and adopting a constitution by a vote of her people, in accordance with the authority and conditions thereof, the State of Oklahoma ratified and bound herself to an observance of all rights of the Indians existing by reason of treaties and agreements made by them with the Government of the United States, and has by such Acts estopped herself to assert an interest in conflict with such rights.

Section 1, Enabling Act;
Clause 3, Section 3, same Act;
Section 22, same Act;
Section 497, Constitution of Oklahoma;
Section 270, Constitution of Oklahoma;
United States v. Rickert, 188 U. S. 439, and authorities.

Section 1 of the said Enabling Act contains the following provision:

> "That nothing contained in said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished), or to limit or affect the authority of the Government of the United States to make any law or legislation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

Section 3 of Clause 3 provides as follows:

> "That the people inhabiting said proposed State do agree and declare that they forever

disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe, or nation;and that, until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States," etc.

Section 22 of the Enabling Act contains the ordinance prevailing in the State of Oklahoma in the following language:

"That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

Section 497 of the Constitution of Oklahoma contains the folowing provision:

"Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocably, accept the terms and conditions of an Act of the Congress of the United States, entitled, 'An Act to enable the people of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States,' " etc., etc.

In conformity to the said Enabling Act and with specific reference to matters of the character herein issued, the Constitution of Oklahoma, in Section 270, provides as follows:

"All property owned by..... etc., shall be exempt from taxation, and such property as may be exempt by reason of the treaty stipulations existing between the Indians and the United States Government or by Federal laws, during the force and effect of such treaties or Federal laws."

No rights which Oklahoma may possess because of her admission to the Union on equal footing with the other States can prevail against her constitutional guarantees. The decision in the case of the United States v. Rickert, above, and the authorities there reviewed, are conclusive upon that question.

VII.

1. A proceeding to enjoin an illegal tax levy, or a levy upon exempt property, is specifically authorized, in the form of the present proceeding, by Section 242 of the Code of Oklahoma, Statutes of 1903; and if the proceeding be against the State, the State, under said statute, has consented thereto.

A., T. & S. F. Ry. v. Wiggins, 5 Ok., 477; 48 Pac. Rep., p. 1,109;

Gray v. Stiles, 6 Ok., 470; 49 Pac. 1083;

Mo. River, Ft. S. & G. Ry. v. Morris, 13 Kans. 227-302;

Hudson v. Co. of Atchison, 12 Kans. 140.

2. Nor would a proceeding of this character be repugnant to the Eleventh Amendment to the Federal Constitution, were it instituted in a Circuit Court of the United States, on the ground that the suit is against the State. The person attempting the unlawful act can be prohibited, notwithstanding the State is interested in the result.

Smyth v. Ames, 169 U. S. 446;

Gunter v. Atlantic Coast Line, 200 U. S. 273.

MARCHIE TIGER'S CASE.

The above case reported in 221 U. S. 286 and other cases relied on by defendant in error, supporting the doctrine of the plenary power of the Government to administer and control the property of tribes and individual Indians and adopt policies and regulations concerning tribes and individual Indians necessary for the general good, are not at all in conflict with the principles which we contend are controlling in this case. We are not called on here to challenge the power of Congress to legislate concerning these matters and to prescribe such legislation in that regard as may be deemed necessary to conserve the well being of the Indian and protect his property, but all this is conceded by us to be settled by the numerous adjudications of this court, as reference to the cases will disclose, among which may be mentioned as follows: Marchie Tiger v. Western Investment Company, 221 U. S. 286; United States v. Sutton, 215 U. S. 291; United States v. Celestine, 215 U. S. 278; McKay v. Kalyton, 204 U. S. 458; Matter of Heff, 197 U. S. 488; United States vs. Rickert, 188 U. S. 432; Lone Wolf v. Hitchcock, 187 U. S. 553; Cherokee Nation v. Hitchcock, 187 U. S. 294; Stevens v. Cherokee Nation, 174 U. S. 445; Choctaw Nation v. United States, 119 U. S. 1; United States v. Kagama, 118 U. S. 445.

In the Tiger's case, above, the question was presented as to the construction and application of certain sections of the Act of Congress of April 26, 1906, in which it was contended by the plaintiff in error that under Section 22 of the said Act, full blood Indians were prohibited from selling inherited

lands without the approval of the Secretary of the Interior but were permitted to sell such lands with his approval. And it was further contended that under said Act this requirement was extended to continue beyond the time fixed by the supplemental Creek agreement and Act of Congress of June 30, 1902. This meaning and application of the statute was denied by defendant in error, whereupon the court in that case was called upon to define the scope and application of the statute considered in connection with other legislation upon the subject.

Plaintiff in error also contended that Congress had the undoubted power to enact legislation of this character, while the defendant in error contended that if the Act had the effect contended for by plaintiff in error, then it was unconstitutional and that such legislation was in violation of the rights of the Indians affected, who had been made citizens of the United States with all the rights, privileges and immunities of citizenship. And the court was thereupon required to determine also whether this legislation had in fact violated any of the personal rights of the Indian secured to him by the grant of citizenship.

When the issues in the above case are examined and the points decided are considered, it becomes manifest that there was no property right involved in the case or question affecting such a right determined by the court. This being true the case is not in point here because the substance of this controversy is a property right pure and simple. The same may be said of the other cases last above referred to, in which the power of Congress to enact laws deemed by it proper to protect the Indian and his property is upheld. In none of these cases is it held or intimated that there is any power anywhere

to deprive the Indian of his property without due compensation, nor that, because he is an Indian, he has a less right in that regard than any other person. They deal largely with the administrative control of the property of Indian Tribes and individual Indians who have not been discharged entirely from the guardianship of the Government. In fact in one of the leading cases cited above (Cherokee Nation v. Hitchcock, 187 U. S. 294) it was specifically observed by Mr. Justice, now Mr. Chief Justice, White, speaking for the court, that,

"There is no question involved in this case as to the taking of property: the authority which it is supposed to exercise by virtue of the Act of 1898 has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with a status of citizenship under recent legislation."

The above paragraph was quoted approvingly by Mr. Justice Day, speaking for the court, in the above, Tiger v. Western Investment Company, and nowhere in the opinion in the latter case can there be found an expression giving color of support to the proposition that Congress would have power to deprive the Indian or an Indian Tribe of a property or property right without due process of law.

SUPREME COURT OF OKLAHOMA.

The decision of the Supreme Court of Oklahoma in this case (114 Pac. Rep. 703) is grounded upon the general proposition that the exemption right relied on by the plaintiff in error was gratuitous and for that reason Congress had the power to withdraw or terminate the same by a subsequent Act. In reaching this conclusion we think, that court has overlooked entirely a controlling consideration because, as we shall show later, the authorities relied on in support of their conclusion are decisions in cases not at all analogous in point of fact to the case at bar.

To what is said by the Oklahoma Court relative to the power of Congress to legislate concerning the control and administration of the property of the Indians or as to their personal well-being as recognized in such cases as Lone Wolf v. Hitchcock, 187 U. S. 553; Stevens v. Cherokee Nation, 174, U. S. 445, United States v. Kagama, 118 U. S. 375, and a number of other cases announcing the same doctrine, we fully agree, but must again insist, that the principles thus announced are not at all in conflict with that for which we here contend. That line of cases hold that Congress may exert plenary power in the interest of the Indian and to protect his property, but none of them hold that this power can be exercised by Congress to derive him of his property.

We now briefly call attention to some of the cases relied on in its opinion to support the theory that the exemption set up in this case is a gratuity. An examination of the facts in Grand Lodge v. New Orleans, 166 U. S. 143, will show that the lodge

owned the property, both the ground and the hall, at the time an Act of the Louisiana legislature was passed which exempted the same from taxation so long as occupied by the lodge; that subsequently, while the hall was still occupied by the lodge, a new constitution was adopted making the property taxable. As held by this Court, there was nothing whatever in that situation, possessing the elements of a contract between the state and the lodge, and the Act of the legislature was a mere bonus, tendered without consideration, unconditionally and without any requirement on the part of the lodge. The case of the County of Stanislaus v. Canal Company, 192 U. S. 553, is one where the legislature by a general Act applicable to the regulation of water companies made a certain provision as to the rate of rents, tolls, etc., which was afterwards changed by the legislature. It was held there that a Water Company organized after the law went into effect was not in a position to object to the modification of the law by the legislature as the legislation did not constitute a contract with the company. The case of Welch v. Cook, 7 Otto 541, is based upon the general act of the assembly of the District of Columbia, exempting from taxation all property, etc., used for manufacturing purposes. It is held that this law might be appealed as it did not constitute a contract.

The case of Goudy v. Meath, 203 U. S. 148, is not sufficiently in point to have any application whatever. The legislation upon which the Goudy case was based was to the effect that the Indians would not have a right to sell their lands until authority to do so should be granted by the legislature of the State in which the lands were situated with the consent of Congress. While the lands were not subject to sale by the Indians they were likewise not subject to forced sale. The legislature of the State of Wash-

ington, with the consent of Congress, had removed the restrictions against the alienation of the lands in controversy. But it was sought in that case, notwithstanding the removal of restrictions, to prohibit the forced sale of the lands for taxes, etc. This Court held that inasmuch as there was no **specific exemption from taxation** that after the land become alienable they were therefore subject to taxation. This is very far from holding that a specific exemption from taxation for a fixed period of time resting upon treaty stipulation and Acts of Congress would not be binding.

It is observed by a review of the cases relied on by the Oklahoma Court that in no instance was there a stipulation in the charter of any of the complaining parties providing for an exemption from taxation and that in no instance did the law make any requirement or place any condition upon the parties availing themselves of its benefits. These facts are emphasized in the Grand Lodge case above (166 U. S. 143).

Several authorities are cited in the opinion, among which are, Horner v. United States, 143 U. S. 570, holding that a treaty may be repealed by an Act of Congress. This rule will not be questioned here. It must, however, be applied with reference to another rule equally as well settled by this Court, to the effect, that while Congress may repeal any law which it has enacted or any treaty into which the government has entered, nevertheless, property rights which have been acquired and become vested under such law or treaty cannot be affected by the repeal thereof. Chinese Exclusion case, 130 U. S. 609.

It is a familiar principle that the citizens of a State have no property interest in a general exemption law, or in the statute of limitations, or in any of that class of laws which through gratuity of the

legislature confers upon them a privilege or benefit. Public policies emanating from such laws may be abandoned at any time by the legislative power which created them. But all this is no answer to the contention of plaintiff in error in this case because the agreements and Acts of Congress granting to her this exemption for a fixed period of years considered in connection with the conduct of the parties vests the transaction with all the elements of a contract.

Nor can this position be answered by a statement that the government was under no obligation to enter into a contract with the Indians because it had the power to enact the laws independent of the Indians' consent. It is sufficient to say that it did not do so, that it invited the negotiations and pledged itself to the fulfillment of the agreements made. Not only did it do these things but to give further emphasis to the transaction it caused the stipulation for the exemption to be inserted in the instrument of conveyance vesting the title in the allottee and caused the instrument to be signed by the Secretary of Interior in relinquishment of the government's interest and by the principal chief of the Creek Nation in relinquishment of the interest of the tribe and making its acceptance a relinquishment of the allottee in all tribal property (31 Stat. 861). It is too late now, after all this, if the question of good faith is not to be entirely overlooked, to assert that the government had the power to enforce the allotment without the consent of the Indian. We again refer the Court to the authorities and argument found under head note V, beginning on page 75 of this brief, where numerous cases by this Court are collected in which transactions of this character constitute a contract protected by the Constitution of the United States.

VIII.

The policy of the Government from the earliest legislation by Congress looking to the allotment of the lands of the Five Civilized Tribes was one based upon the negotiations with the several tribes concerning the matter. The right of Congress to carry out the policy by direct legislation, as it might have done, was not exercised. Every Act of Congress from the first, March 3, 1893, until the last enactments upon the subject, in 1902, specifically provides for or contemplates such negotiations. The commissioners appointed under the said Act of 1893, were authorized to negotiate with the tribes. The authority was continued and reiterated in every subsequent Act until the plan was consummated. Congress not only provided for the negotiation of agreements in the first instance, but whenever the agreements were changed in any particular by Congress, it also provided for a ratification of such change by the vote of the members of the tribes. The Indians believed, as they had a right to believe, that they were a party to the negotiations with the rights of a contracting party. The government needed their co-operation and considered it necessary to the undertaking. To now repudiate so important a feature of the negotiations as a covenant for the exemption of the homesteads from taxation for a given period, in the absence of a public necessity not in contemplation at the time, can never be justified, nor would it be any the less repudiation because done by the government.

The Act of Congress of March 3rd, 1871, prohibit-

ing further treaties with the Indian tribes and contemplating their future government by direct legislation, was wholly superceded, so far as the allotment of the Five Tribes was concerned, by the later Acts, beginning in 1893 and ending in 1902; and such reversal of the policy of the government as to that subject, by this later legislation, must be presumed to have been supported by the best of reasons.

The Acts of Congress, in support of the above, and to which we direct the attention of the Court, are as follows:

Act of March 3rd., 1893, 27 Stat. 645;
Act of June 10th, 1896, 27 Stat. 321;
Act of June 7th, 1897, 30 Stat. 83;
Act of June 28th, 1898, 30 Stat. 495;
Act of July 1st, 1898, 30 Stat. 567;
Act of March 1st, 1899, 30 Stat. 939;
Act of May 31st, 1900, 30 Stat. 221;
Act of October 7th, 1899, 31 Stat. 250;
Original Creek Agreement, March 8th, 1900;
Act of March 1st, 1901, 31 Stat. 861;
Act of May 27th, 1902, 32 Stat. 245;
Supplemental Creek Agreement, June 30, 1902, 32 Stat. 500;
Choctaw and Chickasaw Agreement;
Act of July 1st, 1902, 32 Stat. 641;
Cherokee Agreement, Act of July 1st, 1902, 32 Stat. 716;
Appropriation Act of March 3rd, 1903, 32 Stat. 982.

We have presented in the foregoing authorities and argument the principles upon which we believe the issues in this case must be determined in favor of the plaintiff in error. We say this in full confidence that no principle can be discovered and no au-

thority found under which the plaintiff, and those in like situation, can, without due process of law, be deprived of a vested property right, acquired in good faith, in a legal manner upon valuable consideration. The plaintiff is a citizen of the United States and of the State of Oklahoma; is entirely and completely emancipated from governmental control; is *sui juris* as to person and property, and holds title to her homestead in fee simple. In consideration for her allotment and homestead, with the exemption from taxation for a period of twenty-one years, by the express terms of the agreement, she relinquished her valuable interest and rights in all the property of the Tribe allotted under the agreement. In consideration of her acceptance of the allotment and her homestead with the covenant of exemption, the Government by the specific terms of the agreement released all its interests in the allotment received by her. The contract upon which her rights are based had been completely executed and fully performed by both parties for a period of almost four years at the time of the passage of the Act of 1908. Upon what theory, upon what principle, and upon what authority is she, then, at that late date to be deprived of a part of the value, of a part of the estate and interest received and accepted by her under the terms of the agreement? The exemption is a property right; it is as much of the character of property as any portion of her land itself of an equal value. The right is vested under all authority and had been vested for a long period prior to the Act of 1908.

Can the rights which have been thus acquired be impaired simply because she has heretofore occupied the legal status of an Indian or because she possesses Indian blood? If so, upon what principle or upon what authority can it be done? As reasoned in

Heff's case, is she to be forever barred from the rights and privileges of an American citizen because of her Indian blood; or is she for that reason to be denied "the equal protection of the law."

It may be contended that Congress had the same right to remove the exemption that it had to remove the restriction from her homestead. That position cannot be maintained. The removal of the restriction does not deprive the plaintiff of any property or any property right. It amounts to a withdrawal of the Government of its control over the property, leaving the property intact in the possession of its owner. The removal of a restriction is a mere change in the policy of dealing with the Indian and presumably for his benefit and in no sense involves his property rights; while, on the other hand, any Act, which would destroy or impair the exemption is an interference with a property right and with a thing of value. The distinction, therefore, between a removal of a restriction and the extinguishment of an exemption for a fixed period of years is well marked and clear. The two transactions are altogether different in character and in effect.

It will be seen that the policy of the Government, as well as the uniform ruling of the courts, have been to construe treaties and agreements made with Indians, favorable to the latter. All reasonable doubt as to the exact meaning of such transactions are resolved in their favor. Where differences have arisen in the past in that regard, it has been the policy of the Government and the principle of the Courts to strike an equation doing justice to the Indian according to his understanding.

Many authorities can be cited wherein the plenary power of Congress to deal with Indian affairs is maintained; but in every single case, it will be found

that the courts are dealing with the power of Congress over tribal affairs, tribal property or tribal Indians, concerning persons or property over which the Government has a control. It will likewise be seen that these cases deal with the power of Congress over the question of the policy to be maintained in dealing with such affairs. It has never been held by any court that Congress had the power to deprive an Indian or an Indian Tribe of a property right. Congress can change its method of dealing with the property and with the Indian, and regulate the manner in which it should be used by him or by the Tribe, and can say how much or how little authority it will retain over him or it, but no decision goes farther than that. After a review of many authorities and a reiteration of the doctrine so many times announced concerning the plenary power of Congress in such matters, the Supreme Court, in Cherokee Nation v. Hitchcock, 187 U. S., above, took the precaution to say: "There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the Act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government," etc. And in all the cases where these questions have been before the court, it has been uniformly held that treaty obligations and agreements made with the Indians should be carried out in the utmost good faith, as will be seen by a reference to the authorities reviewed in this brief on that subject.

It is true that Congress did on March 3, 1871, pass an Act declaring that in the future it would enter into no treaties with the Indian Tribes, (16 Stat. 566) and that since that time the Indians have been governed largely by Acts of Congress.

The same Act, however, likewise provides that the Act should not invalidate or impair the obligation of any treaty lawfully made with any tribe.

But it is a significant fact to be noted in this connection that the great Governmental scheme of allotment of the tribal lands of the Indians of the Five Tribes was not promulgated wholly by Acts of Congress nor were any of the Acts affecting this far reaching policy passed until agreed upon by the tribes or made binding until ratified by the tribes concerned. Congress knew, as all past experience has taught, that such a far reaching and comprehensive change of policy as the dividing and allotment to individuals of the lands of the tribes heretofore held in common as tribal estates without the consent and co-operation of the Indians would be utterly disastrous. Congress knew that the only hope of success was in the full co-operation of the Indians themselves. Upon these fundamental considerations the Government invited the negotiations under the direction of Congress and caused them to be conducted over a period of several years and a number of sessions of Congress. Representatives of the Government were appointed and the representatives of the Indians were invited to meet with them in conventions for the purpose of agreeing upon a plan of allotment and making provisions for the protection of the individual Indian. Saying nothing about some earlier efforts along the same line the negotiations which finally culminated in the Supplemental Creek Agreement of June 30, 1902, were commenced as early as 1899 and involved several conventions of the respective representatives, ratifications by vote of the tribes, etc. Was this all insincere and a mere sham and pretense on the part of the Government, as is implied from the argument of the

defendant in error, or was it not done rather because deemed necessary to the success of this policy?

The exemption of the small part set apart as a homestead was a controlling consideration from the standpoint of the Indian in these negotiations. This fact is conceded by the demurrer. Nor was its importance then, or can it now, be regarded lightly by the Government. It was believed then, and time is but demonstrating the wisdom of the conclusion, that the interest of the Indian demanded that there should be some place, some small tract of land, which could not be taken from him by forced sale for public charges, where he could remain or to which he could return for a period of at least one generation and have an opportunity to develop the habits of industry and self-reliance necessary to good citizenship.

In the light of all the facts and circumstances which come in review on the consideration of the negotiations, legislative proceedings and circumstances, which give rise to this litigation, we feel fully warranted in asserting that every consideration of good faith as well as the legal rights of the Indian, demands that the stipulations in the agreements and Acts of Congress, guaranteeing the exemption of the homestead for a fixed period of years should be observed; and that for the reasons herein suggest the decision of the Oklahoma Supreme Court is erroneous and should be reversed.

Respectfully submitted,

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GRANT FOREMAN,
Solicitors for Plaintiff in Error.

M. L. MOTT,
Attorney for Creek Nation.

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Clerk.

SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1911

BESSIE BROWN ENGLISH,
Plaintiff in Error,
vs.
H. T. RICHARDSON, County Treasurer of Tulsa County,
Defendant in Error
No. 589

In Error to the Supreme Court of the State of Oklahoma

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

CHAS. WEST, Attorney General for Oklahoma,
Attorney for Defendant in Error

PROPOSITIONS URGED BY DEFENDANT IN ERROR

(1.) The power of Congress over the Indian is governmental and plenary, not subject to diminution by contract, and to be exercised in accordance with the wisdom and conscience of Congress.

(2.) The State of Oklahoma made no contract. Upon this point the state court is conclusive, as well as upon the question of the meaning of the provisions of the Oklahoma constitution with reference to this case.

(3.) The decision that the State of Oklahoma made no contract is sufficiently broad to determine the case, and being a non-federal question, the appellate jurisdiction of this court is wanting.

(4.) As to the enabling act the parties were the United States and the State of Oklahoma. The plaintiff in error has no individual rights as such therein.

(5.) The plaintiff in error as an individual Indian had no property rights in any of the treaties of the United States nor any separate property rights in the tribal lands which could be enforced in the courts.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

BESSIE BROWN ENGLISH,
Plaintiff in Error,

vs.

H. T. RICHARDSON, County Treasurer of Tulsa County,
Defendant in Error

No. 559

In Error to the Supreme Court of the State of Oklahoma

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

The essentials of the case presented below and now here on appeal as stated in the petition filed in the District Court of Oklahoma State, County of Tulsa (pages 11 to 18 of the printed record) are these:

That Bessie Brown English is a member and citizen of the Creek or Muskogee Tribe of Indians, one of the Five Civilized Tribes, an inhabitant and resident of the County of Tulsa, enrolled as a member of said tribe. Because of the Act of Congress of May 28, 1830, and the patent to the Creek Tribe of August 11, 1852, and the Atoka Agreement and the supplemental agreement approved June 30, 1902, she became possessed, by a warranty deed, of one hundred and sixty acres of communal lands of the tribe, which deed was accepted by her on the 5th day of January, 1904 (page 14 of the record); that she is a Muskogee Indian of less than one-half Indian blood (page 15 of the record); by the Atoka Agreement and the supplemental agreement her homestead was to be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed, which date was the 12th of December, 1902, but that the act of Congress of May 27, 1908, in Section 1 thereof took away this right. It provided that

> "from and after sixty days from the date of this Act, the status of the lands allotted heretofore * * * to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrance, be as follows: All

lands, including homesteads, of said allottees enrolled as * * * means blood Indians, having less than one-half Indian blood * * * shall be free from all restrictions."

And Section 4 thereof provides that
"all land from which restrictions have been or shall be removed shall be subject to taxation * * * as though it were the property of other persons than allottees of the Five Civilized Tribes."

She pleads in her petition (page 15 of the record) that she is among the number of those "from whose homesteads restrictions were removed" by the above provisions of Section 1, but her contention is that this would impair contract right vested in her, in violation of Section 10 of Article 1 of the Constitution of the United States, and deprive her of her property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The Fourteenth Amendment she claims is in point because in the act of Congress of June 16, 1906, commonly termed the Enabling Act of the State of Oklahoma, Section 1 of which provides:

"That nothing contained in the said constitution shall be contrued to limit or impair the rights of persons or property pertaining to

the Indians of said Territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

And then it was provided in Section 3 of said Enabling Act that the constitution of the proposed state should provide, among other things,

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to * * * all lands lying within said limits owned or held by any Indian tribe or nation."

And that by Section 22 it was provided that the constitutional convention provided for therein should by ordinance irrevocable accept the terms and conditions of said act; that by ordinance of the 22nd of April, 1907, the constitutional convention accepted the terms and conditions of the said act, and that the constitution of said state provides in Section 6 of Article 10 thereof that

> "all property owned by * * * shall be exempt from taxation and such property as may be exempt by reason of treaty stipulations,

existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws."

The contention of the plaintiff is, in short, that Congress, by the Atoka Agreement and the supplemental agreement made an inviolable contract with her that her property should be exempt from taxation for twenty-one years after the date of the deed, December 12, 1902; that the State of Oklahoma, under the cited section of the constitution made an inviolable contract with the United States for her benefit to the same effect; and now she complains that the State of Oklahoma has assessed her property for taxation and that the defendant, the treasurer of Tulsa County, is about to issue a tax warrant to be levied upon her property for the collection of the taxes assessed against it out of the sale thereof, if necessary. Her prayer for injunction against such levy and sale was denied by the Oklahoma Court. Its opinion appears at 114 Pac., 710. Her contentions I summarize for the purpose of discussion as follows:

1. She contends that the provisions contained in the Atoka Agreement and the supplemental

agreement as to exemption from taxation are presumed to rest upon a consideration attached to the property as an element in its value, and is, therefore, a property right, and as such, is inviolable

2. She contends that though the power to abrogate the provisions of the treaty inhere in Congress, yet that in a case where the taking of property is involved the power of Congress will not go so far as that.

, 3. She contends that Section 4 of the Act of May 27, 1908, must not be construed as applicable to her land, but only to such lands as to which restrictions had been removed or would be removed by other acts of Congress, for instance, the Act of April 21, 1904, and Section 22 of the Act of April 26, 1906.

4. She contends that the passage of the ordinance irrevocable by the constitutional convention of the State of Oklahoma, together with the cited provision in the constitution of the state, estops the State from asserting an interest in conflict with the rights of the plaintiff.

IS THE TAX EXEMPTION NAMED IN THE ATOKA AND SUPPLEMENTAL AGREEMENTS A PROPERTY RIGHT?

The Supreme Court of Oklahoma was of the opinion that the cited provisions of the Atoka and Supplemental Agreements did not amount to a contract, but was simply the statement of the then pleasure of the legislature, and so remained until subsequently altered by it. I cannot add to the force of what on this head is said by the Oklahoma court, nor do I think of cases more apposite than those cited in its opinion. As sustaining the contention of the plaintiff in error greatest stress is laid upon the case of State of New Jersey vs. Wilson, 7 Cranch, 164. The Oklahoma court well distinguishes the difference of that case from this, but if consideration is had of what it was that Congress was doing in the Delaware case and in the case of the Five Civilized Tribes, this difference between legislative promulgation and legislative contract will at once appear. In the instance of the Delawares it will be noted that the United States is no party to the proceedings. It occurred in 1758, but the State treating directly with the Indians, passed an agreement by which the Indians

released all claim to the lands south of the River Raritan, and it was agreed that the government should purchase a tract upon which the Indians might reside. The government referred to here could only have been the government of New Jersey, and it was provided that as to such newly purchased land

> "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in any wise notwithstanding."

The question was, could the State of New Jersey abrogate this contract? It was decided that this was a contract right which attached to the land; that the purchaser from the Indians stood as to the State in the same condition as did the Indian. The sale was made from the Indian to the purchaser with the assent of the state, with all the privileges and immunities attaching to the land. Chief Justice Marshall said:

> "It is not doubted, but that the state of New Jersey might have insisted on a surrender of this privilege, as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on; the land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians; he stands, with

> respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

It will be noted that there was no question of whether the State of New Jersey, before the adoption of the constitution which vested the control of the Indian in Congress, might not have abrogated this treaty as every sovereign may abrogate his treaty. But it will be noticed that in 1801, after the adoption of the Constitution of the United States, the State of New Jersey passed an Act authorizing Indians to sell their land. In 1803 the land was sold, —the court found, with the assent of the state,— carrying with it all its privileges and immunities. Thus in 1804 when the act was passed repealing the exemption from taxation, it was a citizen of the United States who now held the land and also held a contract from the State of New Jersey for the exemption thereof from taxation. The Fifth Amendment clearly prohibits the state from abrogating that contract with that citizen of the United States. There could have been no question that the provision as to exemption was a contract, not an expression of legislative views only, because it is said that the state assented to the sale of the privileges and immunities with the land.

How different are the facts in the instance of the Five Civilized Tribes! These acts took place after the adoption of the constitution, when no contract could be made with the Indian tribes except with the assent of the United States. In our case the state makes no contract with either the Indian or the Indian tribes, but the United States enters into the treaty, the Atoka and the supplemental treaties. The United States by Act of May 27, 1908, provides that lands upon which restrictions have been or shall be removed shall be subject to taxation. Congress had, it is true, provided in the Enabling Act that the State of Oklahoma must agree upon the exclusive control of Congress over the Indians, and the state in its constitution had exempted from taxation the lands of the Indian tribes, such as were exempted by treaties or Federal laws during the existence of such treaties or Federal laws. This provision of the constitution was not in all respects either useful or necessary. In any event the state was without power to tax either the Indian or the Indian's land except with the assent of Congress. As long as the Indian treaties or the Federal laws exempted such lands from taxation by the state, the state was without power to tax them, and made so by the constitution of the United States

vesting in Congress exclusive control of the Indian, not by reason of the provision of Section 6 of Article 10. All that this part of Section 6 of Article 10 amounts to is a recognition on the part of the state of what is the law, in any event.

Likewise, the attitude of Congress in dealing with the Five Civilized Tribes was utterly different from that of the State of New Jersey when dealing with the Delawares. Without discussing the relative power of the State of New Jersey over the Delawares living within its confines previous to the adoption of the Constitution, it is only necessary to state that the attitude of the states to the Indian tribes within its borders previous to the adoption of the Constitution, where not that of one hostile nation to another, was, in the case of weak states, that of one friendly nation treating with another, or, in the case of strong states and weak nations, that of one power enforcing its might upon another. The inter-connection between the various Indian tribes one with another towards the white man, though discordant among themselves, and the fear that the inconsiderate act of one state by precipitating Indian troubles might force other states into undesired hostilities was the moving cause, among

other things, why the various states surrendered to the national government the control and the exclusive control over the Indians. This control was surrendered to the national government, not only because to the national government was to be surrendered the duty of conducting negotiations and transactions with foreign countries, that is, the treaty-making power of the Union and all its parts, but the especial enumeration of the Indian tribes separately from foreign nations evidences the solicitude of the framers of the constitution to remove the possibility of any discordant treatment of the Indians. But New Jersey when it was dealing with the Indians in 1758 treated with the Delawares on this occasion as a peaceable nation, and what occurred between these two nations was a treaty, and the reason why it was agreed that the Delawares' lands should be forever free from taxation was to assure them, as it were, of the noninterference of the State of New Jersey with them in the possession of their property. A totally different conception and point of view existed in regard to the Indians in the Indian Territory. The remnants of a once powerful people of the state, all autonomous action was in fact lost to them at the date of the Atoka Agreement. It is almost publicly confessed that the duty

of the Daws Commission was to induce the Indians to agree to their allotment peaceably, but it has never been contemplated that the allotment would not have taken place in case the Indians had refused to agree, because it is notorious that under the act those beneficiaries who should refuse to take allotments were to have allotments made for them by public functionaries. The object of the Daws Commission was only to accomplish their allotment with as slight friction as possible. The position of Congress, however, had been determined many years before, that the future prosperity of the red man lay rather in educating him to partake of the life of the nation than in further holding him apart in the continuance of his tribal life. Therefore, the only thing that Congress was doing by these acts was not, as in the case of New Jersey, making an agreement with the Indian to grant his tribe certain lands in exchange for other lands and then to vest him with specific privileges in the granted lands, but was solely to determine the governmental policy, that is, whether he be continued in his tribal existence or as rapidly as possible be assimilated to the condition of the ordinary citizen of the United States, and, because it was feared that an exposure to the burdens of separate ownership

might result in the loss of the land allotted to him, it was specifically agreed as a matter of governmental policy that he should be protected, first for twenty-one years from the date of the Agreement, and afterwards, by the supplemental agreement, twenty-one years from the date of the deed. But subsequently the policy of Congress evoked objections even here, and provided by the Act of April 21, 1904, 33 Statutes, 189, for the sale of half a million acres, being the residue of the lands left over after allotment, and at that time removed the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes who were not of Indian blood, except minors or except as to homesteads, and then provided that the restrictions upon the alienation of all other allottees excepting minors and excepting homesteads might, with the approval of the Secretary of the Interior, be removed.

This clearly indicates that in 1904 Congress was convinced that citizens of the Indian tribes who were not blood Indians did not need the protection of the provision against alienation except in the case of minors and except as to their homesteads. and, further, Congress foresaw that even blood Indians, such for instance, as members of Congress

and the Senators selected by the people of this State to represent them were, because of their experience in the world and other qualifications, entirely capable of conducting their affairs with success, and, therefore, provided that all allottees, excepting minors and as to homesteads, might with the approval of the Secretary of the Interior have their restrictions removed, and a further evidence of the development of this idea in Congress is evidenced by Section 22 of the act of April 26, 1906, 34 Statutes, 137, providing for the removal of restrictions on certain classes of lands and for the alienation thereof, and in the Act of April 26, y906, in Section 19 I find that Congress even determined that where restrictions have been removed the exemption from taxation will also be removed. It is, therefore, nothing but a continuation of the development already noted to find that in the Act of May 27, 1908, Congress determined to remove the exemption from taxation wherever the restrictions upon alienation had been removed, a two-years' experience on that subject having apparently convinced Congress of its wisdom.

In all of this there is only evidence of the exercise of the governmental power of Congress over the

Indian. It will further be noted that in the very act of March 31, 1893, providing for the commissioners to make the grants, in the last paragraph it specifically provided that in making these allotments the government is not acting as a contractor, but as a sovereign. It is there provided:

> "Neither the provisions of this act nor the laws or treaties which may be had or made thereunder shall be held in any way to waive or impair any right of sovereignty which the government of the United States has over or respecting said Indian Territory or the people thereof, or any other right of government relating to said Territory, its lands or the people thereof."

How can there be any further contention in the face of this express provision that at this time, to-wit, March 31, 1893, the government in its dealings with the Indians did not mean to enter into any contract whatever and did not mean to surrender any of its sovereign control over either the people or their lands, and that any agreement made as to their lands would continue to be in the sovereign control of Congress?

Speaking on this subject, this court in the Marchie Tiger case, speaking through Mr. Justice Day, said:

"The sections of the Act of April 26, 1906, * * * show a comprehensive system of protection as to such lands."

And as to the Act of May 27, 1908, he says as to sections 8 and 9:

"The obvious purpose of these provisions is to continue supervision of the right of full blood Indians to dispose of lands by will, and to require conveyances of the interest of full blood Indians of inherited lands to be approved by a competent court."

As to the meaning of the provisions against alienation, Mr. Justice Day says that these were intended to prevent improvident sales by the Indians, and the right of the government to forbid the sale of the inherited land, though the edict of prohibition be made after the allotment, was in that case firmly sustained as within the power of Congress, and the court says as to this act:

"Conceding that Marchie Tiger by the act conferring citizenship obtained a status which gave him certain civil and political rights inherent in the privileges and immunities of such citizenship, unnecessary to here discuss, he was still a ward of the nation so far as the alienation of these lands was concerned, and a member of the existing Crek Nation. The inherited lands, though otherwise held in fee were inalienable

without the consent of the Secretary of the Interior until August, 1907, by virtue of the act of Congress. In this state of affairs, Congress can, with plenary power over the subject, by a new act permit alienation of such lands at any time, subject only to the condition that the Secretary of the Interior should approve the conveyances."

It being now apparent that the policy of Congress has been from the very first to render that exempt from taxation which is made by it inalienable, and to render that subject to taxation which is by it made alienable, it must clearly appear that this provision as to exemption is the outward manifestation of the governmental purpose of protection of the Indian and not the contract whose obligation must not be broken.

Our answer to the first proposition, therefore, is, that the agreements as to exemption from taxation in the Atoka Agreement and the supplemental agreement do not rest upon a consideration, but upon a governmental motive, did not attach to the property as an element in its value, because it is expressly provided that it shall only continue while the property remains in the hands of the original allottee, and, therefore, is not a property right, but

a governmental condition, that as such it is entirely subject to change during the will of Congress, and that all that is said as against the propriety of such change, while cogent for the consideration of Congress, is out of place in court.

INDIAN TREATIES NOT CONTRACTS BECAUSE CONGRESS NOT AUTHORIZED TO CONTRACT.

The second and overwhelming reason why the Atoka Agreement and the supplemental agreement cannot be construed as contracts is because Congress has no power to contract with the Indian nations. The states of the Union are authorized to contract one with another with the consent of Congress, and the President with the consent of Congress may negotiate treaties or contracts with foreign nations, and the officers of the government are by law authorized to make contracts in its name with individuals, but the Indian nation neither stands in the shoes of an individual nor a foreign nation. If it be regarded from analogy with a for-

eign nation, the law is plainly settled that Congress may abrogate treaties at its will.

Thomas vs. Gay, 169 U. S., 271.

A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty.

Foster vs. Neilson, 2 Peters, 253, 314;
Taylor vs. Morton, 2 Curtis, 454.

Treaties with Indians within the United States sand in no better position than treaties with foreign nations.

The Cherokee Tobacco, 11 Wall., 616.

If the Indian is considered from the point of view of an individual and there is a question of Congress dealing with him, it must be rememebered that the Fifth Amendment does not apply to Congress and it was decided by this court in Fleming, et al vs. McCurtain, et al, 215 U. S., 56, that the Choctaw treaty of February 27, 1830, did not create a trust in favor of the then existing members of the tribe and their descendants. In other words, it was held that the ownership conveyed by the patents from Congress to the tribe was a tribal, not an individual, matter, and from this it would follow that the Atoka Agreement and the supplemental treaty,

while made for the protection of the Indian, both individual and aggregate, yet were not made with individual Indians. The whole power of Congress in the subject flows from the provision vesting in Congress the exclusive authority to legislate for the Indians. This being a constitutional power we are met with two principles, first, that no legislature can abridge the power of a succeeding legislature, and, second, that Congress acting under its enumerated constitutional powers, cannot deprive itself of the power which the constitution vests in it,—that the constitution vesting in Congress governmental power over the Indian tribes, Congress cannot convert this into contractural rights. The power of Congress over the Indian and his land is plenary as long as its sovereignty is retained over them as a nation.

Appellant's second proposition is involved in what has been said in answer to her first.

The last clause of the Act of March 31, 1893, showing clearly that Congress did not mean to give up any part of its sovereignty over either the Indian or the Indian's land, it is clear that the Atoka Agreement and the supplemental agreement should be construed as in accordance with the idea of the

retention by Congress of sovereign control over the Indian's land. That control was one of the conditions to be read into the treaties.

In the Marchie Tiger case, as in others, this court emphasizes the necessity of construing together the various acts and treaties enacted *in pari materia*.

SECTION 4 OF THE ACT OF MAY 27, 1908, MUST BE CONSTRUED TO BE APPLICABLE TO PLAINTIFF'S LAND.

The above result flows from the fact that the Act of April 26, 1906, in its nineteenth section specifically provides that lands upon which restrictions are removed shall be subject to taxation. This section, therefore, being enacted *in pari materia* with Section 4 of the Act of May 27, 1908, clearly evinces the intent of Congress to abrogate the condition as to non-taxability which was inserted in the agreements solely for the protection of the Indian, and is a governmental, not a contractural matter. Furthermore, to hold that the fourth section of the Act of May 27, 1908, would not be, as claimed by

the appellant, a deduction to be shown from consideration of the other laws on the subject, but would be against the express unequivocal meaning of the words of the law itself as well as the express and unequivocal meaning of the Act of April 26, 1906. It will be borne in mind that under the Act of May 27, 1908, the restrictions were not to be removed until sixty days from the passage of the Act, or until such time as the Secretary of the Interior would remove them. These sections must be considered in construing Section 4, providing that

> "all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens, as though it was the property of other persons than the allottees of the Five Civilized Tribes."

The words "all lands from which restrictions have been removed" are but the equivalent of the nineteenth section of the Act of April 26, 1906, and, therefore, do not amount to a new enactment, but are but a continuation of the existing law on the subject. The words "all lands from which restrictions shall be removed" must necessarily include the lands of plaintiff, because the restrictions on her lands were not removed,—could not have been until sixty days from the passage of the Act. It, there-

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fore, seems to be a case that does not admit of two interpretations; it is unambiguous, unequivocal language, in harmony with other laws on the subject, and for this reason precludes construction. There is no room for construction.

This court decided in De Yturbide vs. United States, 22 How., 290, that where the legislature makes a plain provision without making any exception, the courts can make none. In Maxwell vs. Moore, 22 How., 185, the court said that to do so would be legislation. See also Pyrie vs. Chicago Title & T. Co., 182 U. S., 438.

THE OKLAHOMA ORDINANCE IRREVOCABLE WAS INEFFECTIVE EXCEPT AS TO MATTERS WHICH CONGRESS PROVIDED AND HAD THE RIGHT TO PROVIDE.

The asserted statement is a necessary concomitant of the holding of this court in the Oklahoma capital case, Coyle vs. Smith, et al, decided at the last term, where it was held that the adoption of the ordinance irrevocable failed to establish as a part of the law of the state and as binding law upon the

state any provision inserted into the Enabling Act which was beyond the power of Congress to insert there. The authorities cited and followed by the court in the Oklahoma capital case reiterate the proposition stated in the 3d Howard, Pollard vs. Hagan's Lessee, and Permoli vs. First Municipality. 3 Howard, 609, that the power Congress in dealing with a state, arising as it does from the constitutional grant, is not, as it were, a matter of contract, and can neither be amplified nor diminished by agreement. A consideration of the ordinance can, therefore, be set aside. The question is purely, what has Congress done, and what power has Congress had to do what it has done?

The position of the state is stated with perfect accuracy by the Supreme Court of the State. The State made no contract. It was not necessary for it to do so. The state would necessarily be controlled by the valid exercise of power by Congress. It appears to us that the following propositions are decisive of this case.

POWER OF CONGRESS PLENARY.

Congress has plenary power over the property of the Indians and of the Indian tribes, and has the

right to amend the Atoka Agreement and the supplemental agreement, not only by the Act of May 27, 1908, but by the Act of April 26, 1908, as well.

Lone Wolf vs. Hitchcock, 187 U. S. 553;
Stevens, et al vs. Cherokee Nation, 174 U. S., 445;
Marchie Tiger vs. Western Investment Company, et al, Last Term.

THE STATE MADE NO CONTRACT.

The State of Oklahoma, neither by its constitution nor by its ordinance irrevocable made a contract as to tax exemption. To this effect see Gleason vs. Wood., 114 Pac., 703, where the court used this language:

> "On Oklahoma coming in as a state, it yielded the right to the federal government to legislate as to this property, of either absolving it from taxation or, by removing the exemption, thereby bringing it within the operation of the general taxing system of the state. When, therefore, Congress acted and the exemption was removed, the state's power to tax by operation of law immediately attached. This, it occurs to us, is the extent, force, and effect of the provisions of the enabling act and the Constitution. The state entered into no contract

with the Indian tribes or the members thereof. It made no agreement, and it received naught from them as a consideration, for the relief which they here demand. Its sole contract in reference to these matters was with Congress, wherein it agreed that it would recognize and respect its legislation. So long as Congress maintained the laws under which these lands were exempt, the state under this agreement was required to recognize the same; but when Congress repealed them, and rendered the lands the same as those of all other citizens of the state, there was no broken pledge on its part when it enforced the same laws with reference to these lands that it did on those of all others."

The state decision as to the existence of a contract is binding upon this court (Wailes vs. Smith, 157 U. S., 271), and also the state decision as to the meaning of the constitution is binding upon this court, Moffitt, et al vs. Kelly, 218 U. S., 400, holding that the inheritance law of California did not vitiate the right of the wife in the others property. The ordinance irrevocable has nothing to do with this matter (Coyle vs. Smith, et al, Last Term). As far as the state is concerned the existence of its contract is not a question reviewable in this court. A standard authority has said:

"Where the highest court of a state having

jurisdiction of a subject decides against the plaintiff in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error must be dismissed without considering the federal question."

Jurisdiction and Procedure of the United States Supreme Court, Taylor, Section 240.

The state court having decided that the state made no contract, that ground was broad enough to rest the judgment upon without a consideration of whether the contract was broken.

IF A CONTRACT BETWEEN A STATE AND THE UNITED STATES, THE LATTER ONLY CAN COMPLAIN OF ITS BREACH.

It is very clear that if there was a contract it was only between the United States and the State. Nothing is pleaded to show any contract between the state and the plaintiff in error, therefore, if there has been a breach of the alleged contract, the parties to that contract are the only persons who can complain of the breach.

Walsh vs. Columbus, Hocking Valley and Athens Railroad Co., 176 U. S., 469.

INDIVIDUAL INDIANS CANNOT COMPLAIN OF BREACH.

Further, if there was a contract, it was made between the United States and the Indian nations, and in no event could the plaintiff substitute herself in the shoes, with the rights, of the Creek or Muskogee Indians. The grant of land to the Creek Nation was to it as a nation, in which no individuals could have any individual rights.

Fleming vs. McCurtain, 215 U. S., 56.

Each of these points appears decisive of this case. We, therefore, respectfully urge that the appeal should be dismissed and the decision of the lower court affirmed.

CHAS. WEST,
Attorney General of the State of Oklahoma,
For Defendant in Error.

ENGLISH *v.* RICHARDSON, TREASURER OF TULSA COUNTY, OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 559. Argued February 23, 1912.—Decided May 13, 1912.

Decided on authority of *Choate* v. *Trapp*, *ante*, p. 665.
28 Oklahoma, 408, reversed.

THE facts, which involve the taxability of Creek allotments in Oklahoma, are stated in the opinion.

Mr. Willard L. Sturdevant, with whom *Mr. Grant Foreman* and *Mr. M. L. Mott* were on the brief, for plaintiff in error.

Mr. Charles West, Attorney General of the State of Oklahoma, for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The plaintiff holds a patent dated December 12, 1902. It was issued to her as a member of the Creek Nation when the tribal lands were divided in pursuance of the same general policy as that discussed in *Choate* v. *Trapp*, *ante*, p. 665. There were, however, a few differences. The tax exemption covered only the homestead of forty acres,

and there was a restriction on alienability for 21 years. The patent, instead of being "framed in conformity with the Agreement," as in the case of the Choctaws and Chickasaws, bore on its face a provision that the land should be non-taxable; the language of the Agreement incorporated in the act of Congress, being that "Each citizen shall select from his allotment forty acres of land . . . as a homestead, which shall be and remain non-taxable, inalienable and free from any encumbrance whatever for 21 years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

These differences are not material. The right of plaintiff to the exemption granted by Congress is protected by the Constitution on principles stated and applied in *Choate* v. *Trapp*. The judgment dismissing her complaint is therefore reversed and the case remanded for proceedings not inconsistent with that opinion.

Reversed.